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155-438

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 531.

ASA P. POTTER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MAY 19, 1893.

(15,323.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 23, 1894.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a cause entitled United States, by indictment, against Asa P. Potter, defendant, numbered 1211, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington on the twentieth day of May, A. D. 1893, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
WILLIAM L. PUTNAM,
Circuit Judge.

April 22, '93.

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, Alexander H. Trowbridge, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this fifteenth day of May, A. D. 1893.

ALEX. H. TROWBRIDGE, *Clerk.*

3 UNITED STATES OF AMERICA, *District of Massachusetts*, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two, before the Honorable William L. Putnam, circuit judge.

4 UNITED STATES *v.* ASA P. POTTER. } 1211, Criminal Docket.

The jurors for the United States of America within and for the district of Massachusetts upon their oath present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-third day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

Irving A. Evans & Co.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-third day of July, did write, place, and put on said check, under the letters "A. P. Potter, P.," thereon and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association, and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-third day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans

and Company, and which said check was then and there of the tenor following—that is to say:

6

Irving A. Evans & Co.

"Boston, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-third day of July, did write, place, and put on said check, under the letters "A. P. Potter, P.," thereon and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and

by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized
7 by said association to lawfully certify checks drawn upon the said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-third day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, copartners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston aforesaid, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction

of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of
8 Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-third day of July at Boston aforesaid within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

that the said person, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Asa P. Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of
9 Boston aforesaid, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend, $2,450 twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said persons, to wit, said copartners, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston aforesaid, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"Boston, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

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Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

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Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid, not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, on the twenty-third day
11 of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president did then and there unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

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"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter,
12 late of said Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there, as such president, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred and fifty dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

the said person, to wit, said Irving A. Evans, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late
13 of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *July* 24, 1891. $25,000. No. 54498.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as

aforesaid did not then and there, to wit, at the time said
14 check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fourth day of July, did write, place, and put on said check, under the letters "A. P. Potter, P.," thereon and before the words "paying teller," on said check, the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Tenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit. Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

15 by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified July 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fourth day of July, did write, place, and put on said check, under the letters "A. P. Potter, P.," thereon and before the words "paying teller," on said check, the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eleventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, co-

partners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check
16 was then and there of the tenor following—that is to say:

"BOSTON, *July* 24, 1891. $25,000. No. 54498.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twelfth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, un-

lawfully, knowingly, and wilfully certify a certain check,
17 which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"Boston, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirteenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States

of America, did then and there as such president unlaw-
18 fully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified July 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said persons, to wit, said copartners, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fourteenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at

said Boston, under and by virtue of the laws of the United
19 States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifteenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and

legally existing and doing business as a national banking
20 association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president did then and there unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

the said persons, such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixteenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National

Bank of Boston, which said association had been theretofore
21 duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following, that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

the said person, to wit, said Irving A. Evans, by whom said check was then and there drawn as aforesaid, not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventeenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston,

which said association had been theretofore duly organized
22 and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of eighty-two hundred seventy-five dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Pay to the order of Geo. C. Brooks & Co. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

that the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred and seventy-five dollars, as he, the said Potter, then and there well knew; that said Jordan, such

paying teller as aforesaid, immediately thereafter, on said
23 twenty-fourth day of July, did write, place, and put on said check, under the letters "A. P. Potter, P.," thereon and before the words "paying teller," on said check, the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighteenth count. And the jurors aforesaid for the United States America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association, and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of eighty-two hundred seventy-five dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Pay to the order of Geo. C. Brooks & Co. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

24 "Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred seventy-five dollars, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fourth day of July, did write, place, and put on said check, under the letters "A. P. Potter, P.," thereon and before the words "paying teller," on said check, the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Nineteenth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of eighty-two hundred seventy-five dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, copartners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

25

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Pay to the order of Geo. C. Brooks & Co. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred and seventy-five dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twentieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fourth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said

26 check was then and there drawn upon said association for the amount of eighty-two hundred seventy-five dollars by a

certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Pay to the order of Geo. C. Brooks & Co. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred seventy-five dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-first count. And the jurors aforesaid for the United States of America — and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United
27 States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association

for the amount of eighty-two hundred seventy-five dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Geo. C. Brooks & C-. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said persons, to wit, said copartners, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred seventy-five dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under
28 and by virtue of the laws of the United States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of eighty-two

hundred seventy-five dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Pay to the order of Geo. C. Brooks & C-, $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said person, to wit, said Irving A. Evans, by whom said check was then and there drawn as aforesaid, not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred seventy-five dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the
29 United States of America; that said Potter as such president did then and there unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of eighty-two hundred seventy

five dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"Boston, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Geo. C. Brooks & C-. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred seventy-five dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there, as such president, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the

amount of eighty-two hundred seventy-five dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Pay to the order of Geo. C. Brooks & C-. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of eighty-two hundred seventy-five dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized
31 and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn

upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

that the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars in money, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fifth day
32 of July, did write, place, and put on said check, under the letters "A. P. Potter, pres.," thereon and before the words "paying teller," on said check, the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit. Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

33

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, to, wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check

was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fifth day of July, did write, place, and put on said check, under the letters "A. P. Potter, pres.," thereon and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, copartners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

34

Irving A. Evans & Co.

"Boston, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check,
35 which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"Boston, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Twenty-ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such president unlaw-
36 fully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said persons, to wit, said copartners, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirtieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United
37 States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-first count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and
legally existing and doing business as a national banking
38 association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president did then and there unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore
39 duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of twenty-five thousand dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"Boston, *Jul-* 25, 1891. $25,000. No. 54518.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

Irving A. Evans & Co.

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following, that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"___ ___,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid, did not then and there, to wit, at the time said check was so certified as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-five thousand dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A.

Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars in money, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fifth day of July, did write, place, and put on said check, before the words "paying teller," on said check, the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

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Thirty-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under

and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Augustus C. Jordan was then and there paying teller of said association, and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the president of said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

42 "Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars, as he, the said Potter, then and there well knew; that said Jordan, such paying teller as aforesaid, immediately thereafter, on said twenty-fifth day of July, did write, place, and put on said check, under the letters "A. P. Potter, pres.," thereon and before the words "paying teller,"

the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, copartners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

43

Irving A. Evans & Co.

"Boston, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"____ ____,

Paying Teller."

that the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the president of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Potter as such president as aforesaid did then and there, to wit, on said twenty-fifth day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said
44 check was then and there drawn upon said association for the amount of seventy-five hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"____ ____,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United
45 States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

Irving A. Evans & Co.

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said persons, to wit, said copartners, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under
46 and by virtue of the laws of the United States of America, did then and there as such president unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J.,
Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid, not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Thirty-ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the
47 United States of America; that said Potter as such president did then and there unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.
A. P. POTTER, *Pres.*,"
(meaning then and there said Asa P. Potter, such president as aforesaid).

"____ ____,
Paying Teller."

the said persons, as such copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fortieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore
48 duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there, as such president, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of seventy-five hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"____ ____,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of seventy-five hundred dollars, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-first count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized
49 and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Addison L. Aldrich was then and there acting paying teller of said association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the cashier of said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under

the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents 50 in money, as he, the said Work, then and there well knew; that said Aldrich, such acting paying teller as aforesaid, thereafterwards, on said thirteenth day of October, did write, place, and put on said check, under the name "J. W. Work" thereon and before the words "paying teller," the initials of his, said Aldrich's, name—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there an officer, to wit, the president, of said association, before the said Work, so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Addison L. Aldrich was then and there acting paying teller of said association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the cashier of said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

51

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check

was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents, as he, the said Work, then and there well knew; *the* said Aldrich, such acting paying teller as aforesaid, thereafterwards, on said thirteenth day of October, did write, place, and put on said check, below the words "J. W. Work, cashier," thereon and before the words "paying teller," the initials of his, said Aldrich's, name—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon
52 their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said persons, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents, as he, the said Work, then and there well knew.

53 And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under

and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

54 "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents in money, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel,

aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

55

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A.,

Paying Teller."

the said persons, so doing business as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association

an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents in money, as he, the said Work, such cashier as aforesaid, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid and the said misdemeanor in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of
56 this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A.,

Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified by said Work as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction
57 of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid and the said misdemeanor in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A.

Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

the said persons, so doing business as copartners under the firm name and style as aforesaid, by whom said check was then
58 and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents in money, as he, the said Work, such cashier as aforesaid, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, such cashier as aforesaid then and there being, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a cer-

tain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of thirty-seven hundred eighty-seven dollars and fifty cents by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $3,787. No. 56003.

Maverick National bank

Pay to the order of Richardson, Hill & C-. $3,787.50, thirty-seven hundred eighty-seven $\frac{50}{100}$ dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

59 "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of thirty-seven hundred eighty-seven dollars and fifty cents, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there an officer, to wit, the president, of said association, before the said Work, such cashier as aforesaid, so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully

certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Forty-ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Addison L. Aldrich was then and there acting paying teller of said association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the cashier of said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

60

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars in money, as he, the said Work, then and there well knew; that said Aldrich, such acting paying teller as aforesaid, thereafterwards, on said thirteenth day of October, did write, place, and put on said check, below the words "J. W. Work, cashier," thereon and before the words "paying teller," the initials of his, said Aldrich's, name—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid,
61 abet, procure, and command the said Work, he, said Work, then and there being such cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fiftieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Addison L. Aldrich was then and there acting paying teller of said association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the cashier of said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said associa-

tion for the amount of nineteen hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

61*a* "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars, as he, the said Work, such cashier as aforesaid, then and there well knew; that said Aldrich, such acting paying teller as aforesaid, immediately thereafterwards, on said thirteenth day of October, did write, place, and put on said check, under the words "J. W. Work, cashier," thereon and before the words "paying teller," the initials of his, said Aldrich's, name—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the

said United States and contrary to the form of the statute in such case made and provided.

Fifty-first count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; tha t said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of
62 this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——, *Paying Teller.*"

that the said persons, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said associa-

tion an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon
63 their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900 nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.
J. W. WORK, *Cashier.*
——— ———,
Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in
64 said check, to wit, the amount of nineteen hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier of said association, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style

of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A.,

Paying Teller."

65 the said persons, so doing business as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars in money, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of this court, said Potter being then and there the president of said association, unlawfully, knowingly, and wilfully did counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National

Bank of Boston, which said association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

66

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A.,

Paying Teller."

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, said Potter being then and there an officer of said association, to wit, the president, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there and during all the times hereinafter mentioned an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

67

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

the said persons, so doing business as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being

then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there and during all the times hereinafter mentioned an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston,
68 which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of nineteen hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $1,900. No. 56004.

Maverick National bank

Pay to the order of Fuller, Harding & C-. $1,900, nineteen hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of nineteen hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, being then and there and at the time hereinafter mentioned an officer, to wit, the president, of said association, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid,
69 against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Addison L. Aldrich was then and there acting paying teller of said association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the cashier of said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style

of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

70 "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars, as he, the said Work, then and there well knew; that said Aldrich, such acting paying teller as aforesaid, thereafterwards, on said thirteenth day of October, did write, place, and put on said check, under the name "J. W. Work" thereon and before the words "paying teller," the initials of his, said Aldrich's, name—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command said Work, he, said Work, being then and there such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their

oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that one Addison L. Aldrich was then and there acting paying teller of said association and as such
71 acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said association when said checks had been certified by the cashier of said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October aforesaid, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as afore-

said, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars, as he, said Work, then and there well knew; that said Aldrich, such acting paying teller as aforesaid, thereafterwards, on said thirteenth day of October, did write, place, and put on said check, below the words "J. W. Work, cashier," thereon and before the words "paying teller," the initials of his, said Aldrich's, name—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully
72 certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command said Work, such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Fifty-ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

73 "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said persons, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixtieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer of a certain national banking association, to wit, the cashier of the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of

the said United States of America; that said Work as such cashier was then and there duly authorized by said association to lawfully certify checks drawn upon the said association; that said Work as such cashier as aforesaid did then and there, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of
74 the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars in money, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully did counsel, aid, abet, procure, and command the said Work, such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the

peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-first count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

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Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A., *Paying Teller.*"

the said persons, so doing business as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further

present that Asa P. Potter, late of said Boston, within said district, before said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said 76 thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier did then and there unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A., *Paying Teller.*"

the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said
77 check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and
78 upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

the said persons, so doing business as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid not then and there, to wit, at the time said check was so certified as aforesaid, having on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars in money, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid and the said misdemeanor in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and during all the times hereinafter mentioned, at Boston aforesaid, within said district and within the jurisdiction of this court, being then and there an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association under and by virtue of the laws of the United States of America, did then and there as such cashier unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association for the amount of fifty-seven hundred dollars by a certain per-

son, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following—that is to say:

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Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

by then and there writing, placing, and putting in and upon and across the face of said check and as a certification thereof the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

that the said person, to wit, said Irving A. Evans, so doing business under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid did not then and there, to wit, at the time said check was so certified by said Work as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of fifty-seven hundred dollars, as he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, such cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter,

late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of
80 Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that one Augustus C. Jordan was then and there paying teller of said banking association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said banking association when said checks had been certified by the president of said banking association; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss and then and there doing business under the firm name and style of Irving A. Evans and Company was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said
81 check by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon the books of said banking association, all of which he, said Potter, then and there well knew; that thereafterwards, on said twenty-third day of July, said Jordan, such paying teller as aforesaid, did write, place, and put on said check, below the letters "A. P. Potter, P.," on said check, and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that one Augustus C. Jordan was then and there paying teller of said banking association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said banking association when said checks had been certified by the president of said banking association; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

82 that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer, to wit, said Irving A. Evans (so then and there doing business under the firm name and style of Irving A. Evans and Company), upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, said Potter, then and there well knew; that thereafterwards, on said twenty-third day of July, at said Boston, said Jordan, such paying teller as aforesaid, did write, place, and put on said check, below the letters "A. P. Potter, P.," on said check, and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in

the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business under the firm name and style of Irving A. Evans and Company was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

83

Irving A. Evans & Co.

"Boston, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, all of which he, the said Potter, then and there well knew;

that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon the books of said banking association, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

84 Sixty-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

Irving A. Evans & Co.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there Asa P. Potter, such president as aforesaid).

"____ ____,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and
85 fifty dollars, had been regularly entered to the credit of said dealer, to wit, said Irving A. Evans (then and there doing business under the firm name and style of Irving A. Evans and Company), upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Potter as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Sixty-ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss and then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association, and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

86 "Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J., *Paying Teller.*"

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by said banking association in transacting its said banking business, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon any book of said banking association then in use by it in transacting its said banking business, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking associa-

tion had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, *and* then and there doing business with and was then and there a dealer with said banking association and as such dealer, did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

87

Irving A. Evans & Co.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J., *Paying Teller.*"

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer, to wit, said Irving A. Evans (so then and there doing business under the firm name and style of Irving A. Evans and Company), upon any book of the said banking association then in use by said banking association in transacting its said business, all of which he, the said Potter, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Potter as aforesaid, regularly entered to the credit of said dealer upon any book of the said banking association then in use by it in transacting its said business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regu-

larly stand to the credit of said dealer upon any book of said banking association then in use by it in transacting its said business, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-first count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of
88 this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said business, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said business, and said amount
89 of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon any book of said banking association then in use by it in transacting its said business, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and

upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"____ ____,

Paying Teller."

90 before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of twenty-four hundred and fifty dollars, had been regularly entered to the credit of said dealer upon any book of the said banking association then in use by it in transacting its said business, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer upon any book of the said banking association then in use by it in transacting its said business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon any book of said banking association then in use by it in transacting its said business, all of which he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that one Augustus C. Jordan was then and there paying teller of said banking association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said banking association when said checks had been certified by the president of said banking association; that a certain copartnership then and

there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

91 that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"—— ——,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said banking business, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon any book of said banking association then in use by it in transacting its said banking business, all of which he, the said Potter, then and there well knew; that thereafterwards, on said twenty-fifth day

of July, at Boston aforesaid, said Jordan, such paying teller as aforesaid, did write, place, and put on said check, below the letters A. P. Potter, pres., on said check, and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly existing and doing business as a national
92 banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that one Augustus C. Jordan was then and there paying teller of said banking association and as such paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said banking association when said checks had been certified by the president of said banking association; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"____ ____,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to wit, said Irving A. Evans (so then and there doing business under the firm name and style of Irving A. Evans and Company), upon any book of the said banking association then in use by it in transacting its said business, all of which he, the said Potter, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer upon any book of the said bank-
93 ing association then in use by it in transacting its said business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon any book of said banking association then in use by it in transacting its said business, all of which he, said Potter, then and there well knew; that thereafterwards, on said twenty-fifth day of July, at said Boston, said Jordan, such paying teller as aforesaid, did write, place, and put on said check, under the letters "A. P. Potter, pres.," on said check, and before the words "paying teller," the initials of him, said Jordan—that is to say, "A. C. J."—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said check, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that a certain copartnership

then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in
94 and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said banking business, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon any book of the said banking association then in use by it in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon any book of said banking association then in use by it in transacting its said banking business, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank *at* Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Potter as such president was then and there duly authorized by said banking association to lawfully certify checks drawn upon said banking association; that a certain person, to wit, Irving A. Evans, was then and there doing business under the firm name and style of Irving A. Evans and Company and was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certi-
95 fication, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to

wit, said Irving A. Evans (so then and there doing business under the firm name and style of Irving A. Evans and Company) upon any book of the said banking association then in use by it in transacting its said banking business, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Potter as aforesaid, regularly entered to the credit of said dealer upon any book of the said banking association then in use by it in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon any book of said banking association then in use by it in transacting its said banking business, all of which he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-
96 one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, as such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and

upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J., *Paying Teller.*"

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said bank-
97 ing association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, all of which he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there duly presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"A. C. J., *Paying Teller.*"

98 before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to wit, said Irving A. Evans (so then and there doing business under the firm name and style of Irving A. Evans and Company as aforesaid), upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Potter as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Seventy-ninth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston,

under and by virtue of the laws of the United States of America; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting
99 in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the said amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer, to wit, said copartnership, upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer, to wit, said copartnership, upon the books of said banking association, all of which he, said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eightieth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Asa P. Potter, late of Boston, within said district, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the president, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

100

Irving A. Evans & Co.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Maverick National bank

Pay to the order of Nat'l Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

that said Potter, such president as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*,"

(meaning then and there said Asa P. Potter, such president as aforesaid).

"——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of seventy-five hundred dollars, had been regularly entered to the credit of said dealer upon the books of the said banking association, all of which he, the said Potter, then and there well knew; that the said amount of money

so specified in said check was not then and there, to wit, at the time of such certification of said check by said Potter as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Potter as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-first count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business
101 as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that one Addison L. Aldrich was then and there acting paying teller of said banking association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said banking association when said checks had been certified by the cashier of said banking association; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said association, which said check was then and there presented to said banking association, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

Irving A. Evans & Co.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore

set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars, had been regularly entered to the credit of said dealer upon any book of the said banking association then in use by said banking association in transacting its said business, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification of said check by said Work as aforesaid, regularly entered to the credit of said dealer upon any book
102 of the said banking association then in use by it in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon any book of said banking association then in use by it in transacting its said banking business, all of which he, said Work, then and there well knew; that thereafterwards, on said thirteenth day of October, at said Boston, said Aldrich, such acting paying teller as aforesaid, did write, place, and put on said check, below the words "J. W. Work, cashier," on said check, and before the words "paying teller," the initials of him, said Aldrich—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, he, said Potter, being then and there president of said banking association and then and there well knowing all the premises aforesaid, unlawfully, knowingly, and wilfully, then and there, on said thirteenth day of said October, at said Boston, in the district aforesaid and within the jurisdiction of this court, did aid, abet, incite, counsel, and procure the said Work, the said Work then and there being cashier as aforesaid, so as aforesaid to unlawfully, knowingly, and wilfully certify said check in manner and form as aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-second count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in

the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that one Addison L. Aldrich was then and there acting paying teller of said banking association and as such acting paying teller was then and there duly authorized to authenticate the certification of checks drawn upon said banking association when said checks had been certified by the cashier of said banking association; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

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Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——, *Paying Teller.*"

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars, had been regularly entered to the credit of said dealer upon any book of the said banking association then in use by said banking

association in transacting its said banking business, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon any book of the said banking association then in use by said banking association in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon any book of said banking association then in use by said banking association in transacting its said banking business, all of which he, said Work, then and there well knew; that thereafterwards, on said thirteenth day of October, at said Boston, said Aldrich, such acting paying teller as aforesaid, did write, place, and put on said check, under the words "J. W. Work, cashier," on said check, and before the words "paying teller," the initials of him, said Aldrich—that is to say, "A. L. A."—in token that he, said Aldrich, as such acting paying teller, then and there authenticated said certification of said check.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, he, said Potter, being then and there president of said banking association and then and there well knowing all the premises aforesaid, unlawfully, knowingly, and wilfully then and there, on said thirteenth day of said October, at said Boston, in the district aforesaid and within the jurisdiction of this court, did aid, abet, incite, counsel, and procure the said Work, he, said Work, then and there being cashier as aforesaid, so as aforesaid to unlawfully, knowingly, and wilfully certify said check in manner and form as aforesaid, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

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Eighty-third count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business as copartners under the firm name and style of Irving A. Evans and Company, was then and there doing business with and then and there was a

dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

105 "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

—— ——,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars, had been regularly entered to the credit of said dealer upon the books of the said banking association, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, he, said Potter, being then and there the president of said banking association, unlawfully, knowingly, and wilfully then and there, before the said misdemeanor was committed by said Work in manner and form aforesaid, to wit, on said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, did aid, abet, incite, counsel, and procure the said Work, he, said Work, then and there being cashier as aforesaid, so as aforesaid to unlawfully, knowingly, and wilfully certify said check and the misdemeanor aforesaid in manner and form aforesaid to do and

commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-fourth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that said Work as such cashier was then and there duly authorized by said banking association to lawfully certify checks drawn upon the said banking association; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certi-
106 fication, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——, ——,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dol-

lars, had been regularly entered to the credit of said dealer upon the books of the said banking association, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, he, said Potter, being then and there the president of said banking association, unlawfully, knowingly, and wilfully then and there, before the said misdemeanor was committed by said Work in manner and form aforesaid, to wit, on said thirteenth day of October, at Boston aforesaid, within said district and within the jurisdiction of this court, did aid, abet, incite, counsel, and procure the said Work, he, said Work, then and there being cashier as aforesaid, so as aforesaid to unlawfully, knowingly, and wilfully certify said
107 check and the misdemeanor aforesaid in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-fifth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and then and there was a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A., *Paying Teller.*"

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars,
108 had been regularly entered to the credit of said dealer upon the books of the said banking association, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, he, said Potter, being then and there the president of said banking association, unlawfully, knowingly, and wilfully then and there, before the said misdemeanor was committed by said Work in manner and form aforesaid, to wit, on said thirteenth day of October, at Boston, within said district and within the jurisdiction of this court, did aid, abet, incite, counsel, and procure the said Work, he, said Work, then and there being cashier as aforesaid, so as aforesaid to unlawfully, knowingly, and wilfully certify said check and the misdemeanor aforesaid in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-sixth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late

of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain person, to wit, Irving A. Evans, then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

109 that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

A. L. A., *Paying Teller.*"

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars, had been regularly entered to the credit of said dealer upon the books of the said banking association, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said banking association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then and there cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid and the said misdemeanor in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-seventh count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there and during all the times hereinafter men-
110 tioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain copartnership then and there composed of Irving A. Evans, Austin B. Tobey, and William S. Bliss, and then and there doing business under the firm name and style of Irving A. Evans and Company, was then and there doing business with and then and there was a dealer with said banking association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

Irving A. Evans & Co.

"Boston, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

"Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars, had been regularly entered to the credit of said dealer upon any book of the said banking association then in use by it in transacting its said banking business, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon any book of the said banking association then in use by it in transacting its said banking business, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon any book of said banking association then in use by it in transacting its said banking business, all of which he, the said Work, then and there well knew.

111 And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said banking association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, the said Work, being then and there cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid and the said misdemeanor in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

Eighty-eighth count. And the jurors aforesaid for the United States of America within and for the district of Massachusetts upon their oath aforesaid do further present that Joseph W. Work, late of Boston, within said district, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one, at Boston aforesaid, within said district and within the jurisdiction of this court, was an officer, to wit, the cashier, of a certain national banking association, to wit, the Maverick National Bank of Boston, which said banking association had been theretofore duly organized and established and was then and there and during all the times hereinafter mentioned duly and legally existing and doing business as a national banking association, at said Boston, under and by virtue of the laws of the United States of America; that a certain person, to wit, Irving A. Evans, then and there doing business

under the firm name and style of Irving A. Evans and Company, was then and there doing business with and was then and there a dealer with said association and as such dealer did then and there draw a certain check upon said banking association, which said check was then and there presented to said banking association for certification, and which said check was then and there of the tenor following—that is to say:

"BOSTON, *Oct.* 13, 1891. $5,700. No. 56005.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Walter, Tucker & C-. $5,700, fifty-seven hundred dollars.

IRVING A. EVANS & C-."

that said Work, such cashier as aforesaid, did then and there unlawfully, knowingly, and wilfully certify said check hereinbefore set forth by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following—that is to say:

112 "Maverick National bank.

Certified Oct. 13, 1891.

Pay only through clearing-house.

J. W. WORK, *Cashier.*

——— ———,

Paying Teller."

before the amount of money then specified in said check hereinbefore set forth, to wit, the amount of fifty-seven hundred dollars, had been regularly entered to the credit of said dealer upon the books of the said banking association, all of which he, the said Work, then and there well knew; that the amount of money so specified in said check was not then and there, to wit, at the time of such certification by said Work as aforesaid, regularly entered to the credit of said dealer upon the books of the said banking association, and said amount of money so specified in said check did not then and there, at the time of such certification by said Work as aforesaid, regularly stand to the credit of said dealer upon the books of said banking association, all of which he, the said Work, then and there well knew.

And the jurors aforesaid upon their oath aforesaid do further present that Asa P. Potter, late of said Boston, within said district, before the said Work so unlawfully, knowingly, and wilfully certified said check in manner and form aforesaid, to wit, on the said thirteenth day of October, at said Boston, within said district and within the jurisdiction of this court, he, the said Potter, being then and there an officer, to wit, the president, of said banking association, did unlawfully, knowingly, and wilfully counsel, aid, abet, procure, and command the said Work, he, said Work, being then

and there cashier as aforesaid, to unlawfully, knowingly, and wilfully certify said check in manner and form aforesaid and the said misdemeanor in manner and form aforesaid to do and commit, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided.

This indictment was presented by the grand jury at the May term of this court, A. D. 1892.

At the said term the following demurrers were filed:

Demurrer to 1st to 40th Counts, Inclusive.

(Filed Sept. 15, 1892.)

And the said Asa P. Potter, in his own proper person, cometh into court here and demurs to each and every of the 1st to 40th counts, inclusive, of said indictment, and says that each and every of the said 1st to 40th counts, inclusive, of said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Asa P. Potter is not bound by the law of the land to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Asa P. Potter prays judgment, and that by the court he
113 may be dismissed and discharged from the said premises in each and every of the said counts of said indictment specified.

ASA P. POTTER.

Demurrer to 41st to 64th and 81st to 88th Counts, Inclusive.

(Filed Sept. 15, 1892.)

And the said Asa P. Potter, in his own proper person, cometh into court here and demurs to each and every of the 41st to 64th and 81st to 88th counts, inclusive, of said indictment, and says that each and every of the said 41st to 64th and 81st to 88th counts, inclusive, of said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Asa P. Potter is not bound by the law of the land to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Asa P. Potter prays judgment and that by the court he may be dismissed and discharged from the said premises in each and every the said counts of said indictment specified.

ASA P. POTTER.

Demurrer to 65th to 80th Counts, Inclusive.

(Filed Sept. 15, 1892.)

And the said Asa P. Potter, in his own proper person, cometh into court here and demurs to each and every of the 65th to 80th counts, inclusive, of said indictment, and says that each and every of the

said 65th to 80th counts, inclusive, of said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Asa P. Potter is not bound by the law of the land to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Asa P. Potter prays judgment, and that by the court he may be dismissed and discharged from the said premises in each and every of the said counts of said indictment specified.

ASA P. POTTER.

Special Demurrer to Each and Every Count of said Indictment.

(Filed Oct. 12, 1892.)

And the said Asa P. Potter, in his own proper person, cometh into court here and, having demurred generally to the above counts of said indictment, now by leave of court demurs specially to said counts and each of them and says that each and every count of said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient
114 in law, and for causes of demurrer shows that said counts are bad.

1. Counts 1–40, both inclusive, and 65–80, both inclusive, are fatally defective in not setting out any offence under the laws of the United States.

2. Counts 41–64, both inclusive, and 81–88, both inclusive, being the counts charging aiding and abetting, are fatally defective in not setting out any offence under the laws of the United States.

3. Counts 41 to 64, both inclusive, and 81 to 88, both inclusive, are fatally defective, in that they do not show any offence committed by Work, the principal, as there is no allegation in any of said counts that the checks therein referred to were delivered by the bank to any person as part of the certification thereof.

4. In counts 1 and 2, 9 and 10, 17 and 18, and in two out of eight counts made on each check throughout the indictment, where it is charged that the check was authenticated by the paying teller, no offence is set forth, in that there is no allegation that the money was not on deposit, etc., at the time the paying teller authenticated the check.

5. The first 64 counts are defective, in that the allegation "amount of money equal to the amount specified" is argumentative.

6. Counts 65 to 88, both inclusive, are bad for duplicity and uncertainty.

And that the said Asa P. Potter is not bound by the law of the land to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Asa P. Potter prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment and each and every count thereof specified.

ASA P. POTTER.

This cause thereupon came on to be heard by the court upon the foregoing demurrers, and was fully argued by counsel for the respective parties, and was thence continued to this present October term, 1892, when the opinion of the court thereon is read and filed; and thereupon, to wit, October 29, 1892, it is ordered that the demurrers be sustained as to counts forty-one to sixty-four, inclusive, and as to counts eighty-one to eighty-eight, inclusive; that said counts forty-one to sixty-four, inclusive, and counts eighty-one to eighty-eight, inclusive, of the said indictment be quashed; that demurrers be overruled as to the remaining counts, and that defendant have leave to plead thereto.

At the said October term, 1892, the following bill of exceptions is allowed and filed:

Defendant's Bill of Exceptions upon Overruling of Demurrer and Sustaining Certain Counts of said Indictment.

(Filed Nov. 2, 1892.)

And now comes the defendant and, having heretofore filed a general demurrer to the above indictment and by leave of court having filed a special demurrer setting forth the grounds of
115 such demurrer, and this circuit court having on the 29th day of October, 1892, entered an order overruling the said demurrers so far as said demurrers related to counts 1–40, both inclusive, and 65–80, both inclusive, of said indictment and sustaining said counts, now this defendant excepts to said order overruling the said demurrers and sustaining the validity of said counts 1–40, both inclusive, and 65–80, both inclusive, and says that the said circuit court has erred in the order overruling said demurrers and sustaining said counts, and for causes of exception says:

1. The circuit court has erred in overruling said demurrers and sustaining said counts, in that said counts and each of them are not sufficient in law and do not set out any offence under the laws of the United States, in that said counts and each of them set forth the certification of a check simply by a writing upon said check, and fail to set forth any completion of the contract of certification, and fail to set forth any delivery of said certification to any person whatever, and fail to set forth the creation of any contract of certification or liability whatever of the said association upon said check.

2. The circuit court has erred in overruling said demurrers and sustaining said counts, in that said counts and each of them are fatally defective in that the allegation "amount of money equal to the amount specified" contained in each count and forming a substantial averment thereof is argumentative,

3. The circuit court has erred in overruling said demurrers and sustaining counts 65 to 80, both inclusive, in that said counts are bad for duplicity and uncertainty.

4. The circuit court has erred in overruling said demurrers and sustaining counts 1, 2, 9, 10, 17, 18, 25, 26, 33, 34, 65, 66, 73, 74, in that said counts and each of them are defective in that they fail to

allege that the money was not on deposit at the time the paying teller authenticated the check specified in each of said counts.

And the defendant prays that these his exceptions may be allowed.

ASA P. POTTER.

HENRY D. HYDE, *Of Counsel.*

U. S. Circuit Court, Mass. District, October Term, 1892.

Allowed Nov. 2nd, 1892.

W. L. PUTNAM,
U. S. Circuit Judge.

At the said October term, 1892, the said Asa P. Potter is set to the bar and has this indictment read to him; whereupon he says that thereof he is not guilty.

Thereupon, to wit, February 8, 1893, the attorney of the United States for said district comes and says that he will no further
116 prosecute this indictment as to counts sixty-five to eighty, inclusive.

A jury is thereupon empanelled and sworn according to law to try the issue, namely, Ellery B. Crane, foreman; George W. Avery, John A. Bancroft, Adolphus Bangs, Charles H. Bannister, Robert Brookhouse, Edward C. Butterfield, Hiram G. Burr, William Becker, Charles B. Carr, Clark S. Cary, and Joseph R. Dexter, who, after hearing all matters and things concerning the same, return their verdict and on oath say that said Asa P. Potter is guilty on the 1st, 3d, 7th, 9th, 11th, 15th, 17th, 19th, 23rd, 25th, 27th, 31st, 33rd, 35th, and 39th counts and not guilty on the 2d, 4th, 5th, 6th, 8th, 10th, 12th, 13th, 14th, 16th, 18th, 20th, 21st, 22d, 24th, 26th, 28th, 29th, 30th, 32d, 34th, 36th, 37th, 38th, and 40th counts of the indictment.

On the nineteenth day of April, A. D. 1893, the following bill of exceptions was allowed in open court and filed:

Defendant's Bill of Exceptions.

An indictment under section 5208 of the Revised Statutes of the United States, as amended by the act of July 12, 1882, sect. 13, was returned by the grand jury at the May term, 1892, of the circuit court of the United States for the district of Massachusetts, sitting at Boston, in said district, against Asa P. Potter, the defendant, charging him, as the president of the Maverick National Bank of Boston, a national banking corporation organized under the laws of the United States and located at said Boston, with unlawfully certifying five certain checks drawn by one Irving A. Evans & Co. upon the Maverick National Bank of Boston.

The indictment when presented by the grand jury contained eighty counts, the scheme of the indictment being as follows: Counts 1 to 8, both inclusive, severally charged the unlawful certification of a single check, numbered 54493, dated Boston, July 23, 1891, drawn by Irving A. Evans & Co. upon the Maverick National bank,

payable to the order of Hayward & Townsend, for the sum of twenty-four hundred and fifty dollars, these eight counts differing somewhat in statement, but each being based on the certification of the same check.

Counts 9 to 16, both inclusive, severally charged the unlawful certification of a single check, numbered 54498, dated Boston, July 24, 1891, drawn by Irving A. Evans & Co. upon the Maverick National bank, payable to the order of the National Security bank, for the sum of twenty-five thousand dollars, these eight counts differing somewhat in statement, but each being based on the certification of the same check.

Counts 17 to 24, both inclusive, severally charged the unlawful certification of a single check, numbered 54499, dated Boston, July 24, 1891, drawn by Irving A. Evans & Co. upon the Maverick National bank, payable to the order of George C. Brooks & Co., for the sum of eighty-two hundred and seventy-five dollars, these eight counts differing somewhat in statement, but each being based upon the certification of the same check.

Counts 25 to 32, both inclusive severally charged the un-
117 lawful certification of a single check, numbered 54518, dated Boston, July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank of Boston, payable to the order of the National Security bank, for the sum of twenty-five thousand dollars, these eight counts differing somewhat in statement, but each being based upon the certification of the same check.

Counts 33 to 40, both inclusive, severally charged the unlawful certification of a single check, numbered 54519, dated Boston, July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National bank, payable to the order of National Security bank, for the sum of seventy-five hundred dollars, these eight counts differing somewhat in statement, but each being based upon the certification of the same check.

Counts 41 to 64, both inclusive, charged the unlawful certification by one Joseph W. Work of certain checks drawn by Irving A. Evans & Co. upon the Maverick bank, and charged the defendant, Asa P. Potter, with unlawfully aiding and abetting the said Joseph W. Work in such unlawful certification.

Counts 65 to 80, both inclusive, charged the unlawful certification by the defendant, Asa P. Potter, of the two checks numbered 54493 and 54498, and described respectively in counts 1 to 8 and 9 to 16 of the indictment, eight counts being devoted to each check, and these counts differing from the first sixteen counts in charging the certification to have been made before the amount of the checks had been regularly entered to the credit of the dealer upon the books of the association.

On or about September 15th, 1892, general demurrers were filed by the defendant to each and every count of the indictment, and on or about October 12th, 1892, by leave of court, special demurrers were filed to each and every count of the indictment.

On or about October 29th, 1892, after argument upon said demurrers, counts 41 to 64, both inclusive, were quashed by the court,

and counts 1 to 40, both inclusive, and 65 to 80, both inclusive, were sustained by the court. Exceptions were duly taken and filed by the defendant to the ruling of the court sustaining the validity of counts 1 to 40 and 65 to 80, all inclusive, on or about November 2nd, 1892, and the said exceptions were duly allowed by the court on or about November 2nd, 1892.

The defendant then pleaded not guilty, and a trial was had. During the trial, the defendant not objecting, the Government nol-*prossed* counts 65 to 80, both inclusive.

At the trial the following vote of the directors of the Maverick National bank was admitted in evidence:

BOSTON, *Nov.* 1, 1886.

Special meeting of the directors held today, Pres't Potter and Messrs. Mansfield, Woods, Dana, and French being present. It was voted that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, providing the bank is in funds for amount of said checks when the same are presented, all such checks when certified to be countersigned by paying teller.

A. P. POTTER, *P.*

Attest: J. W. WORK, *C.*

118 The Government offered the evidence of several witnesses, who were employed in the Maverick National bank at the times set forth in the indictment, tending to show that Exhibits A, B, C, D, and E, being all the checks set out in the indictment, were drawn upon said bank by Irving A. Evans & Co., a dealer with said bank and brokers; that all these checks were brought to the cashier's department for certification on the respective dates thereof, either by the drawer or the payee, between ten and eleven o'clock in the morning, and were handed to the clerk, who was acting as assistant in that department, who prepared said checks for certification by stamping them as follows:

Maverick National bank.

Certified July 23, 1891.

Pay only through clearing-house.

——— ———, *Cashier.*

——— ———,

"*Paying Teller.*"

That the only variation in this stamp, as applied to the checks, was the change of date corresponding to the date of the check; that the clerk receiving the check which was to be certified as part of his official duty examined a pad or block used by the clerks, who were assistants to the assistant cashier, to see how Evans & Co.'s account stood. This pad or block, which was destroyed at the end of the day, contained a list of the active brokers' accounts by whom checks were likely to be presented for certification, which showed the debit balances in the morning, with deposits made and checks certified during the day; that there was a debit and credit for each

account on the pad, which showed a large debit balance in the account of Evans & Co. on the morning of each day, and at the time of certification of the said exhibits showed that the deposits were not equal to the overdraft, and the clerk receiving the checks and examining the pad had the amount of said debit balance before him, with the amount of deposits and memorandum of checks certified, when he proceeded to effect the certification of the check as hereinafter stated.

To show that deposits were immediately notified to or ascertained by the person in charge of the pad and entered thereon, the defendant cites the following evidence of Fred. W. Dunbar, Jr., one of the two assistants to the assistant cashier:

"Q. And how would you get the information?

A. Immediately on a broker making a deposit it was recorded. The teller sent a slip over to the assistant cashier's department, saying that so much money had gone to the credit of that broker.

Q. When you say to the cashier's department you mean it come to your, Smith's, table there?

A. Yes, sir.

Q. So that if Irving A. Evans & Co. deposited $50,000 before clearing, the receiving teller—or the note teller in this case, wasn't it?

A. The note teller; yes, sir.

Q. In this case?

A. In Irving A. Evans' case.

Q. The note teller would receive that deposit and would send over to Mr. Smith's table a notice that it was in?

A. Yes, sir.

Q. Do you recall whether or not from your department—
119 Dommet, Smith, and yours—inquiries were sometimes made of the paying teller of the note teller whether that deposit had come in before certification? Had you any personal knowledge or recollection?

Mr. ROBINSON: One moment. Of course it is limited to his own inquiry.

Col. HOPKINS: Certainly. No, if he heard anybody else.

Q. If you had personal knowledge of it, is my only question.

A. Whether inquiries have been made of the note teller?

Q. Yes, sir; if you had not the information before certification?

A. Yes, sir.

Q. Whether that deposit was in?

A. Yes, sir."

In this connection HENRY H. MELVILLE, called by the defendant, who was assistant note teller, testified as follows in reference to the deposits of Irving A. Evans & Co. which came into the bank through the note teller's window:

Q. Are you and the note teller the men who received the deposits?

A. Yes, sir.

Q. If you had anything to do with them, tell what you did.

A. At noon time—there was generally a deposit came in in the morning, before ten o'clock, and in the ordinary course of business there would be a deposit come in at noon time, and I would take those deposits as soon as convenient—as soon as I could get a messenger—and I would send them over to the check teller.

Q. That is the last you had to do with them?

A. Yes, sir.

Q. When they came to the teller—the check teller—you would send them over?

A. Yes, sir.

Q. What hours do you mean by noon time?

A. From quarter to 12 to quarter to 1.

Q. That was in the usual course of business?

A. Yes, sir.

Q. And that ended your relation to that deposit?

A. Yes, sir.

The evidence tended to show that this pad was made up in the cashier's department upon information voluntarily given or asked for by the assistant in that department. There was also evidence tending to show that the said Smith or some other clerk went in the morning to the book-keeper's and made up the list of balances at the beginning of the day which appeared on the pad, or copied the balance from the overdraft slip which was sent down from the book-keepers every morning to the cashier's desk, and that there was on said Smith's desk a list showing the state of the brokers' accounts and the deposits of the day and the checks as they were certified, and it was a debit and credit account; that there was an overdraft slip sent down each morning, upon which appeared the overdraft of Evans & Co., showing an overdraft to the account of said Evans & Co. on the 23d day of July amounting to $178,166.01; that this slip was sent down on the morning of the 24th of July, showing the amount of said overdraft balance of said Evans and Co. to be $187,964.36, and said slip on said 25th day of July, in the morning, showed an overdraft balance in said account of $201,257.15; that this overdraft slip was revised by the book-keeper, who had charge of the account, between eleven and twelve o'clock in
120 the forenoon of each day, by deducting therefrom the amounts which were deposited by said Evans & Co. before ten o'clock each day, and on the days mentioned in the indictment the amounts so deducted were $50,000, $55,000, and $50,000 on said 23, 24, and 25th respectively, which amounts were checks of Evans & Co. on other banks deposited over clearing which were paid in due course; that this overdraft slip, both before and after revision, was sent to the cashier's department and was upon the cashier's desk. The figures above given appear again later in these exceptions in the detailed statement of accounts.

The evidence tended to show that Exhibits C, D, and E were certified after the morning deposit and before eleven o'clock.

The checks constituting the deposits of Evans and Company were endorsed by Evans and Company with a stamped endorsement as follows:

"For deposit only in Maverick National bank to the credit of I. A. Evans & Co."

The Government called a witness, F. W. Dunbar, Jr., who had been the clerk acting as assistant to the assistant cashier in the certification of one of the Exhibits A, B, C, D, and E, who, being asked about the slips bearing overdrafts and the pad, was asked, "The two together would show the state of the account?" and answered, "Yes, sir."

It was testified by the cashier, Work; the assistant cashier, Domett, and the assistant Smith and the assistant Dunbar that the overdraft slip sent down in the morning to the cashier's desk was not the same thing as the pad used in certifying checks.

The above evidence as to the routine or method employed in the certification of the five checks, Exhibits A, B, C, D, and E, was testified to be the usual course of procedure in the certification of checks at the bank.

The charge tickets or certified tickets hereinafter referred to were in the following form:

BOSTON, 7, 23. No. 54493.

Maverick National bank.

Certified check Hayward & Townsend, charge account I. A. E. & Co., $2,450.

Having ascertained how the account stood, the clerk receiving the check for certification impressed upon it the certification stamp and dated it, a copy of which is hereafter inserted, and made out a charge ticket, so called, which was in effect a copy of the check, and took the check to the assistant cashier, if he were present, to have the certification signed by him. In the absence of the assistant cashier the check would be carried to the cashier, and in the absence of both the assistant cashier and the cashier and not otherwise it would be taken to the president for signature to the certification.

A copy of the certification stamp is as follows:

121 "Maverick National bank.

Certified Jul- —, 1891.

Pay only through clearing-house.

—— ——, *Cashier.*
—— ——, *Paying Teller.*"

The check, together with a charge ticket, *were* then put into a cash-carrier system and sent to the paying teller, who put his initials upon the certification stamp, against the words "paying teller," and passed the check through his window to the person waiting to receive the same, and put the charge ticket upon a spindle.

At the end of the day a "credit certified-check ticket," so called, which was made up by taking the charge tickets off the spindle from time to time and listing them under the names of the respective drawers, was completed. The total amount of checks certified during the day were then credited upon the paying teller's book to the certified-check account and debited against the particular bank book on which the dealer's account was kept, which was known as the "Banks' and Bankers' Balance Book No. 4," and was kept by a book-keeper upstairs.

The credit certified-check tickets afterwards went to the general book-keeper down-stairs, and the checks were listed by him upon a certified-check book, so called, and were credited upon the balance book of the bank when they came in through the clearing and were paid.

The charge tickets were sent from time to time during the day to the book-keeper who had charge of the accounts of the drawer of the checks described on said charge tickets, and the amounts thereof debited to the account of the drawer of the certified checks.

There was evidence tending to show that at the opening of business of the bank on July 23, 1891, the account of Irving A. Evans & Co. showed a debit balance of $178,166.01.

That before ten o'clock in the morning and before clearing, and before the certification on that day of any checks drawn by Evans & Co., Evans & Co. deposited $50,000; that between twelve o'clock and half past one o'clock Evans & Co. made the second deposit, consisting of $85,363.62, and before three o'clock a third deposit of $12,100.

That the total charges against the account of Evans & Co. upon that day, including interest of $25.88 upon the debit balance, and checks drawn by Evans & Co., which were either certified or paid upon that day, amounted to $157,261.97, the total deposits being $147,463.62.

That at the opening of business of the bank on July 24, 1891, the account of Irving A. Evans & Co. showed a debit balance of $187,964.36.

That before ten o'clock in the morning, and before the certification on that day of any checks drawn by Evans & Co., Evans & Co. deposited $55,000; that between twelve o'clock and half
122 past one o'clock Evans & Co. made a second deposit of $55,551.20, and before three o'clock a third deposit of $6,770.

That the total charges against the account of Evans & Co. upon that day, including interest of $25.27 upon the debit balance and checks drawn by Evans & Co. which were either certified or paid upon that day, amounted to $130,613.99, the total deposits being $117,321.20.

That at the opening of business of the bank on July 25, 1891, the account of Evans & Co. showed a debit balance of $201,257.15.

That before ten o'clock in the morning and before clearing, and before the certification on that day of any checks drawn by Evans & Co., Evans & Co. deposited $50,000; that later in the day Evans & Co. deposited $93,119.27.

That the total charges against the account of Evans & Co. upon that day, including interest of $53.23 upon the debit balance and checks drawn by Evans & Co. which were either certified or paid upon that day, amounted to $132,717.59, the total deposits being $143,119.27.

There was evidence tending to show that the certification pad or block kept in the cashier's department showed on the morning of July 23, 1891, and before the certification of any checks of Evans & Co. on that day, against the name of I. A. Evans & Co. the debit balance of $178,166.01 and the first deposit of $50,000; that when the second deposit of $85,363.62 came in it was credited upon this pad or block; that when the check Exhibit A was certified it was debited upon this pad or block.

That on the morning of July 24, 1891, and before the certification of any check of Evans & Co. on that day, the said pad or block showed against the name of Evans & Co. the debit balance of $187,964.36 and the first deposit of $55,000; that when the second deposit of $55,551.20 came in it was credited upon this pad or block; that when the checks Exhibits B and C were certified they were debited upon this pad or block.

That on the morning of July 25, 1891, and before the certification of any check of Evans & Co. on that day, the said pad or block showed the debit balance of $201,257.15 and the first deposit of $50,000; that when the next deposit of $93,119.27 came in it was credited upon this pad or block; that when the checks Exhibits D and E were certified they were debited upon this pad or block.

The defendant cites the following evidence of FRANK E. SMITH, one of the two assistants to the assistant cashier, as tending to show that the debit balance, the deposits, and the certified checks appeared upon the certification pad or slip each day:

Q. Did you receive in the morning from the book-keepers' department a schedule of the balances of bankers and brokers who were in the habit of having checks certified there?

A. I obtained such a list.

Q. Did you go for it?

A. I sent for it.

Q. Where did you send?

A. Sent to the book-keepers who kept the accounts.

Q. Where were they?

A. Part of them were down-stairs, on the same floor that my desk was on, and one was upstairs.

123 Q. And the one that was upstairs was whom?

A. The name of the book-keeper?

Q. A Mr. Ernest Moore.

Q. He kept—how would you describe the book he kept?

A. He kept a book called Banks and Bankers No. 4, I think.

Q. And from that book, Mr. Moore, what statement—I don't ask you what the statement was, but what the character of the statement was you got? Who did it refer to?

A. To the firm of I. A. Evans & Co.

Q. And your slip—your slip that you kept, or record or schedule, or whatever you call it—what did it show upon your desk in regard to those persons who were in the habit of getting certifications of checks?

A. It showed the condition of the accounts at the opening of the business on any given date.

Q. What time of day would you get that?

A. Before 10 o'clock.

Q. What would, in the ordinary course of business and in relation to Evans & Co.'s checks and others—what changes would take place in relation to that schedule during the day?

A. On one side would appear a list of checks which had been certified, and on the other side would appear deposits which had been made.

Q. During the day?

A. During the day.

Q. How would you get the deposits, Mr. Smith?

A. From the tellers.

Q. By what process?

A. Sometimes it was sent over by word of mouth, and sometimes on a block in the cash-carrier system.

Q. Any other way that you know?

A. I beg pardon.

Q. Whether it was ever obtained by inquiry by you?

A. Yes, sir.

Q. Do you know at about the time on the 23rd, 24th, and 25th of July, 1891, of the deposit by Evans & Co. of $50,000?

A. Do you mean if I remember it now?

Q. If you remember that there was a deposit of $50,000?

A. Yes, sir; I do.

Q. What time in the day on each of those days, to the best of your recollection, was the deposit of $50,000 made?

Mr. ROBINSON: Does it appear that there was more than one day?

Mr. HOPKINS: Well, one day it appears——

The COURT: You will get on better to ask each day by itself, Mr. Hopkins.

Q. I shall have to show the witness, I suppose, what the account is, then. On one of these days there is a deposit of $50,000?

A. Yes, sir.

Q. On two of them, in fact?

A. Yes, sir.

Q. Do you know when these deposits of $50,000 were made in the day?

A. Yes, sir.

Q. When?

A. Before 10 o'clock.

Q. On another of these days the first deposit, according to some other evidence in the case, appears to be $55,000. That was the first deposits that day. When was it made?

A. Before 10 o'clock.

Q. And in relation to those days do you say that that de-
124 posit was communicated to you or ascertained by you at the time or its being made, or soon after its being made?

A. It came to my knowledge before 10 o'clock.

Q. Before 10 o'clock it came to your knowledge?

A. Yes, sir.

Q. Did you certify or put on, I mean, the stamp and day and whatever else you have testified in relation to those checks—any of them before 10 o'clock?

A. No, sir.

(By Mr. ALLEN:)

Q. When you looked, as you have testified, Mr. Smith, at this slips did you see the overdraft of Evans & Co.?

A. If there was one.

Q. Did you see whether or no the deposits on that slip exceeded the overdraft?

The COURT: I thought you spoke of slip. Perhaps I misunderstood. I thought it was a pad he kept it on.

Mr. ALLEN: Well, pad. I supposed my brother referred to the pad and slip as the same.

The COURT: Well, there are slips in the case, and this has been spoken of as a pad.

Mr. HOPKINS: Schedule of balances, I called it. I understood the word pad as the pad on which he noted the check.

Q. You did not misunderstand, Mr. Smith?

A. I don't know whether there is a misunderstanding or not by counsel, but I mean the same thing by pad or slip.

The COURT: What do you mean by slip?

The WITNESS: The slip Mr. Allen speaks of.

The COURT: And pad is the same thing?

The WITNESS: Yes, sir.

There was evidence tending to show that before the checks, Exhibits A, B, C, D, and E, severally were presented to the defendant for certification the clerks presenting the same ascertained that there was a deposit shown upon the said block or pad, and it was part of their duty to ascertain this fact.

There was evidence tending to show that on each day during the month of June and July, 1891, prior to July 23, 1891, the account of Irving A. Evans & Co. showed at the opening of each day a large debit balance; that interest was each day charged upon the same, and that large deposits were made each day by Evans & Co.

There was evidence tending to show that the debit balance at the beginning of each day's business during June and July, 1891, was obtained by taking the debit balance of the morning previous, adding to the same all charges against the account for that day and deducting therefrom all deposits made during that day, thus balancing the account at the end of that day, which balance then became the debit balance of the next morning.

There was evidence tending to show that the signature A. P. Potter, p't, in the certification stamp was the defendant's, and that the initials A. C. J. were written by A. C. Jordan, the paying teller.

The Government offered five checks in evidence, Exhibits A, B, C, D, and E, and offered to read the certifications thereon to the jury.

125 Copies of these checks, with the certifications of Mr. Potter thereon and the initials of the paying teller, are as follows:

EXHIBIT A.

"BOSTON, *Jul-* 23, 1891. $2,450. No. 54493.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Hayward & Townsend $2,450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & CO."

"Maverick National bank.

Certified Jul- 23, 1891.

Pay only through clearing-house.

A. P. POTTER, *P., Cashier.*

A. C. J., *Paying Teller.*"

EXHIBIT B.

"BOSTON, *Jul-* 24, 1891. $8,275. No. 54499.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Geo. C. Brooks & Co. $8,275, eighty-two hundred seventy-five dollars.

IRVING A. EVANS & C-."

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P., Cashier.*

A. C. J., *Paying Teller.*"

126 EXHIBIT C.

"BOSTON, *Jul-* 24, 1891. $25,000. No. 54498.

Maverick National bank

Irving A. Evans & Co.

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

"Maverick National bank.

Certified Jul- 24, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*, *Cashier.*

A. C. J., *Paying Teller.*"

EXHIBIT D.

"BOSTON, *Jul-* 25, 1891. $7,500. No. 54519.

Irving A. Evans & Co.

Maverick National bank

Pay to the order of National Security bank $7,500, seventy-five hundred dollars.

IRVING A. EVANS & C-."

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *P.*, *Cashier.*

A. C. J., *Paying Teller.*"

127 EXHIBIT E.

"BOSTON, *Jul-* 25, 1891. $25,000. No. 54518.

Irving A. Evans & Co.

Maverick National bank

Pay to the order of Nat'l Security bank $25,000, twenty-five thousand dollars.

IRVING A. EVANS & C-."

"Maverick National bank.

Certified Jul- 25, 1891.

Pay only through clearing-house.

A. P. POTTER, *Pres.*, *Cashier.*

A. C. J., *Paying Teller.*"

The defendant objected to the reading — the above certifications on Exhibits A, B, C, D, and E to the jury for the following reasons:

1. In view of the evidence of the vote of the directors on Nov. 1, 1886, which has been admitted, and the evidence of the method of certification of checks in this bank, which has been testified to, the evidence offered shows a certification bearing the initials of the paying teller as his signature in countersigning the certification, which we claim is an integral and essential part of the certification and which is not set forth at all as such in the 1st, 2d, 3d, 4th, 7th, and 8th counts of the indictment in each set of eight counts, and which is set forth in the 5th and 6th counts only as being made by the ac-

cused, while the evidence shows that the countersigning was done by the paying teller, A. C. Jordan. As to all counts, we claim a variance which renders the proffered evidence inadmissible.

2. We claim that this variance appears as matter of law, and that the evidence proffered is not admissible as competent on any question to the jury as to whether it is a part of the certification.

The evidence of the method of the bank as to certification referred to in the objection was what has been hereinbefore set forth.

The court thereupon allowed the certification to be read to the jury, and the defendant excepted to the introduction of the said certifications in evidence for the above reasons.

During the trial William S. Bliss, a partner of the firm of Irving A. Evans & Co., was allowed to testify to two conversations with the defendant occurring in the bank some time in the month of June, 1891, and three conversations with the defendant occurring
128 some time in the month of July, 1891, before July 23rd, the witness being unable to fix the date of these conversations more definitely, the conversations in June being substantially alike those in July and those in July being testified to as follows:

Question. "What was that conversation?"

Answer. "I went to get a check certified and went to see Mr. Potter for that purpose, and stated to him that Mr. Evans sent me over to get the check certified, because we must have the check certified; and he stated that Mr. Evans had not kept his word—had not done as he agreed to—had not reduced the overdraft or loan, and it was not fair and right. I repeated what Mr. Evans would say, that we must have the check certified, and after awhile the check would be certified."

No objection was made to this answer.

The second conversation was testified to in the following words: "I would see Mr. Potter and state that I had come over to get a check certified. Mr. Evans requested me to do so; and he would state that Mr. Evans had not kept his word—had not done right—had not reduced the overdraft."

The third conversation was given in the following words: "I went over to get a check certified, one of the firm checks, and would speak to Mr. Potter and say that Mr. Evans had sent me over, and he said that Mr. Evans had not kept his word, and had not done right in not reducing the overdraft and the loan."

These conversations being in, in the last two conversations stated herein the witness was allowed to testify, against the defendant's objection and exception, that in each case the check presented was then certified.

The defendant's exception was put on the ground the evidence tended to prove an immaterial and incompetent fact relating to the certification of another check at another time immaterial to the only ground upon which the inquiry could be entered into—that is, the knowledge of the existence of the overdraft or overdraft loan.

The Government offered in evidence other checks than those in the indictment, dated July 23, 24, and 25, 1891, to wit, five checks on July 23, three checks on July 24, and five checks on July 25, all

checks of Irving A. Evans and Co. and all certified by the defendant, thirteen in all, on the ground that they were the acts of the defendant and assisted in proving or had a tendency to prove knowledge on the part of the defendant as to the condition of that account—the amount of deposits or overdraft.

The defendant objected to their admission on the ground that they were an attempt to prove other acts, which might or might not be in connection with the accounts of the same day, which might or might not be criminal in their character, and on the ground that they were irrelevant to the proposition touching knowledge and intent in the certification of the checks that are included in the indictment, and, being other substantive facts and occasions, they are not admissible for the purpose for which they are offered, and also that they could only be admissible as proof of other transactions which would require the same proof under the statute that the facts existed which would make the certification of each individual check a criminal offence as apply
129 to the certification of the checks set forth in the indictment.

The court said that he would put the responsibility upon the United States and admitted the above certification of checks in evidence so far as they were certified before Exhibit E, on July 25, 1891.

The defendant excepted for the above reasons, and the above checks, as certified, six in number, Exhibits 37, 38, 39, 40, 41, 43, that were certified on July 23d and 24th, 1891, were read in evidence.

There was evidence tending to show that the total deposits to the credit of Evans & Co. on July 23, 1891, amounted to $147,463.62; on July 24, 1891, amounted to $117,321.20, and on July 25, 1891, amounted to $143,119.27; that the total certifications of Evans & Co. checks on July 23, 1891, amounted to $109,133.09; on July 24, 1891, amounted to $85,925, and on July 25, 1891, amounted to $107,363.23.

There was no evidence that any portion of said deposits made on July 23, 1891, were specifically withdrawn by the depositor, Evans & Co., prior to the certification of Exhibit A, unless it can be gathered or inferred from this bill of exceptions, nor was there anything tending to show that any portion of said deposits were specifically withdrawn by said certification unless it can be gathered or inferred from this bill of exceptions.

There was no evidence that any portion of said deposits made July 24, 1891, were specifically withdrawn by the depositor, Evans & Co., prior to the certification of Exhibits B and C, unless it can be gathered or inferred from this bill of exceptions, nor was there anything tending to show that any portion of said deposits were specifically withdrawn by said certification unless it can be gathered or inferred from this bill of exceptions.

There was no evidence that any portion of said deposits made on July 25, 1891, were specifically withdrawn by the depositor, Evans & Co., prior to the certification of Exhibits D and E, unless it can

be gathered or inferred from the bill of exceptions, nor was there anything tending to show that any portion of said deposits were specifically withdrawn by said certification unless it can be gathered or inferred from this bill of exceptions.

The counsel for the defence called Joseph W. Work, the cashier, and interrogated him as follows:

Q. What was that debit balance between Mr. Evans & Company and the bank?

To this question the Government objected.

The counsel for the defence thereupon stated that the inquiry related to "the nature of the account."

In this connection the counsel for the defence made the following offer:

"My offer is to show by this and other witnesses that the apparent overdraft, debit balance, due from Irving A. Evans & Co. to the bank, arising out of the account current, on each of the mornings, was treated by both parties, under an understanding between them, as a loan, on which daily interest was charged, the interest being figured upon the amount which was ascertained after clearing—
130 the amount of money ascertained after clearing—that the bank was out during the day, what the bank was out of one day, as the sum which in justice interest should be paid upon; and that the indebtedness was ascertained at the end of each day by balancing the account at the end of each day; and that this arrangement was carried out by a deposit of collateral in the hands or in the department of the assistant cashier, who was the usual certifying officer of the bank."

The COURT: "Have you, in this connection, any entries upon the books of the bank to put in?"

The counsel for the defence thereupon replied: "The entries of these balances, I believe, are in. The entries of interest are in—that is, if they are not in I should offer them."

The COURT: "They are in. Have you any other entries upon the books of the bank to go in in connection with this subject-matter?"

Counsel for the defence thereupon replied: "I have not, your honor. I think, if your honor please, all these entries have been called to the attention of the jury, unless there may be entries upon the teller's book of interest that have not been testified to as interest. I understand that the interest was cast by Mr. Domett, ordinarily, the assistant cashier, who had the run of the loan; and I understand that he, I speak a little hesitatingly because I am not quite sure, but I think these entries went on the books of the teller; at any rate, they went on the books of Mr. Moore, and that is in."

The COURT: "Well, besides the entries of interest, have you any other entries in this connection?"

A. "I think not; I don't remember any other."

Counsel for the defence thereupon stated as follows: "Now, if your honor please, the first proposition that I have to make is this: * * * In the first place, a loan may be created by an arranged

overdraft. Our second proposition is that if a loan is created by an arranged overdraft it may be carried legitimately as a loan."

The COURT: "Let me ask you, before your remarks, whether you propose to show that what you call a loan was for any specific amount?"

Counsel for the defence: "Only at this period of time we are discussing there was what you may call a general limit of about $200,000—that is, not to exceed it.

"The figures that have been put in run from $120,000, I think, in June, up to $200,000, on one of these three days, but no actual, absolute limit, but a limit of about $200,000, which you may call a limit."

Upon the objection of the Government the court ruled out this question and this offer of evidence, and the defendant excepted.

The defence called the defendant, Mr. Potter, and offered to prove by him an oral agreement between I. A. Evans & Co. and the Maverick National bank, in the early part of 1891, before June or July, 1891, that Evans & Co. might have a loan by overdraft limited to $200,000, with interest to be charged daily at the rate of six per cent., against which collateral was to be put up, and further to show that the overdrafts existing in June and July, 1891,
131 were under this agreement, and that collateral was actually deposited and kept against it in the hands of the assistant cashier; that this agreement was communicated to the executive officers of the bank and to a majority of the directors of the bank, who approved it, and this offer was made in connection with the facts that appear in evidence in relation to the books of the bank; also the defence offered another conversation between Mr. Potter and Mr. Evans in relation to the matter of certification of checks and deposits connected with this certification, in which Mr. Evans called his attention to the fact that a check had been refused certification, and Mr. Potter told Mr. Evans that it was undoubtedly because he had no deposit there. Whereupon Mr. Evans said, "But I have a loan, as I understand it;" to which Mr. Potter replied substantially, "We cannot certify checks against a loan; if you are going to have certified checks you must have deposits in the bank to certify them against;" and that from that time forward the deposits were in, to Mr. Potter's knowledge, from day to day after this conversation with Mr. Evans, in which the defence claims that the parties to the conversation understood distinctly that the daily deposits were to be in for the very purpose of certifying checks.

This whole offer was made by the defence as material matter of substantive defence, as a part of the *res gestæ* and of the transaction, and as specifically bearing upon the question of criminal intent upon the part of the defendant. The facts "that appear in evidence in relation to the books of the bank," as referred to in the above offer and in connection with which the offer is made, are heretofore fully stated in this bill of exceptions.

The defence then put the following questions to the witness, the defendant, for the purpose of proving the facts set forth in the above offer of evidence:

Q. Did you have any conversation, Mr. Potter, with Irving A. Evans, prior to June and July, relative to overchecks? That is capable of an answer yes or no.

A. Relative to overchecks?

Q. Well, to paying checks that were overdrawn?

A. Yes, sir.

Q. About when, as nearly as you can state?

A. It was in the early part of 1891; I am unable to fix the precise date Mr. Evans came in.

Q. I want to ask you what that conversation was?

A. Mr. Evans came into the bank and complained to me——

Mr. ROBINSON: Well, wait a moment.

Q. What did he say?

Mr. ROBINSON: If he is going to give the conversation, give it, but not the results of it.

A. Well, he stated to me that we had inconvenienced him or discommoded him—I do not undertake to say the exact words—by not certifying his check promptly.

Mr. ROBINSON: Wait a moment. I cannot anticipate what he — going to say, but I understand it is within the rules your honor has laid down.

The COURT: I have heard no objection.

132 Mr. ROBINSON: Then I object to it.

The COURT: I rule it out, and you can note your exception, Mr. Hopkins.

Mr. HOPKINS: Your honor rules out a definite agreement.

The COURT: Yes, sir; I rule out anything that does not appear on the books of the bank in connection with this deposit. I think what was on deposit and not on deposit as the case now stands must be determined by what appears on the books of the bank—as this case now stands—and the papers of the bank. I consider the testimony offered by Mr. Dunbar was admissible. I think the question is what was done and not what was agreed to be done; and you may put your questions as you deem proper to save your rights, and such additional questions as you may deem proper to save your rights.

Mr. HOPKINS: Coupled with the offer to prove the offer——

The COURT: Yes; that is already made.

Mr. HOPKINS: The special agreement to the limit of $200,000.

The COURT: Yes; you may state, if you desire, in the record that they are connected with the offer which you made on Friday, so as to have it appear plain. You may put as many questions as you may deem proper to save your rights.

Mr. HOPKINS: I do not understand that your honor's ruling excluded the question, as I have not put it.

The COURT: It did not in terms exclude it, because I do not intend to exclude any defense—any questions you may put. I only outline generally, as I outline it now, whether they had money on

deposit or not. As the case stands, it depends upon what was in the bank. In other words, the question is of what was done and not what was agreed to be done or arranged to be done. As I told you, in what I said I was perhaps trenching on the province of the jury and I could not complete what I started to say, and I finally concluded by saying that I would rule upon that question and such other questions as you might offer.

Mr. HOPKINS: In looking at the stenographer's report of what was said on Friday I do not see that the offer contained the proposition as he had it—what was the understanding and arrangement made between the president of the Maverick bank and Mr. Evans beforehand for a loan of the character set forth in the offer.

The COURT: You use the word understanding.

Mr. HOPKINS: Now, I offer to prove the actual agreement.

The COURT: You may put into the stenographer's notes whatever you desire.

Mr. HOPKINS: I offer to prove an agreement between I. A. Evans & Co. and the Maverick National bank.

The COURT: State something about the time.

Mr. HOPKINS: In the early part of 1891, before June or July, 1891, that they might have a loan by overdraft limited to $200,000, against which collateral was to be put up, and I offer further to show that the overdraft existing in June and July were under that agreement, and that collateral was actually deposited and kept against it in the hands of the assistant cashier. So far as this is concerned, I believe that is all.

The COURT: I understand the offer is to prove an oral agreement and not a written one.

133 Mr. HOPKINS: An oral agreement. I offer also to show that the agreement was known to and approved by a majority of the directors of the bank.

Mr. ROBINSON: Not any record evidence of that, I believe.

Mr. HOPKINS: No.

Mr. ROBINSON: No record evidence.

Mr. HOPKINS: Well, I offer to prove it; that is enough; that is my offer, to prove that it was known to a majority of the directors and was approved by them; and this offer is made in connection with the facts that appear in evidence or put in in relation to the books of the bank. I offer also another conversation in relation to the matter of certification of checks and deposits which may be connected with this, before which I will proceed and ask the witness, in order that——

The COURT: Do you want to put that in the notes now?

Mr. HOPKINS: Yes, sir; to be offered.

The COURT: What is the nature of that?

Mr. HOPKINS: Well, the nature of that is——

The COURT: Does it bear upon this present question?

Mr. HOPKINS: I think they are intimately connected, but I don't know what your honor's view may be in relation to that. It was intended to go to the effect that Evans & Co. were required to deposit daily.

(At this point the court requested the jury to retire. Afterwards Mr. Hopkins proceeded.)

Mr. HOPKINS: The other conversation — which I intend to address the attention of the witness is a conversation in which Mr. Evans—perhaps it is the conversation which he started to give, in which Evans called his attention to the fact that a check had been refused certification, and the witness told Mr. Evans that it was undoubtedly because he had no deposit there; whereupon Mr. Evans said, "But I have a loan, as I understand it;" to which Mr. Potter replied, substantially, We cannot certify checks against a loan; if you are going to have certified checks, you must have deposits in the bank to certify them against; and that from that time forward the deposits were in, to Mr. Potter's knowledge, from day to day after this conversation with Mr. Evans, in which I claim that they understood distinctly that the daily deposits were to be in for the very purpose of certifying checks. Now, as far as the overdraft conversation is concerned, I understand that to be this: That Mr. Evans applied for a loan by way of overdraft, as he had previously—it had been from time to time; the balance had gone the other way and Mr. Potter told him that he could have a loan by overdraft, limiting it to $200,000, with interest to be charged daily at 6%, and Mr. Potter communicated that to the executive officers of the bank, and a majority of the directors, who approved it. Then, further than that is the fact that appears already, that the very day interest was charged upon this loan, calculated after clearing, and I propose also to show why interest was charged at that time of the day—that is, why the balance of the charging of interest was struck at that time by Mr. Potter.

The COURT: Now, in this connection, do you propose to
134 show any entries upon the bank books in addition to what have already gone into the case?

Mr. HOPKINS: So far as I know, there are no other entries on the bank books except what have gone into the case. In the books—that is to say, the ledger which contains the account between Mr. I. A. Evans & Co. and the Maverick Bank—there is no balance struck except at the end of the day. In the sheets with which the cashier dealt, during the day there was a balance after clearing, as the evidence now shows, made, as we claim, for the purpose of calculating interest on a fair and proper sum.

The COURT: Well, have you anything on the book to put in, before I rule, in connection with this subject-matter? If so, I will let you put it in now.

Mr. HOPKINS: Nothing, except I should want to ask Mr. Domett, and possibly Mr. Potter as well, to explain the calculation of interest after clearing.

The COURT: That is an explanation.

Mr. HOPKINS: That is not on the books, but on a pad, and that pad is destroyed. There are no entries in the books that I am aware of that are not in the case.

The COURT: Well, I will let you put in whatever you desire to

put in about the interest item, and then I will rule upon the question.

Mr. HOPKINS: Very well, sir.

Mr. HOPKINS: This whole offer, if your honor please, I offer as material matter of substantive evidence, as a part of the transaction and as specifically bearing upon the question of intent. I can conceive that the other questions which I should put to Mr. Potter would be imperfect unless I were allowed to show what I propose to show.

The COURT: Now, have you got the question?

Mr. HOPKINS: It is in the record that I asked nothing further than this matter of interest, and I might show what was in there.

Mr. ROBINSON: Show the method of computation.

Mr. HOPKINS: What we propose to prove about interest is that interest was calculated at that time of day, because at that time the bank would know how much money it would be actually out of use of by this loan—that is, the $50,000 deposited before clearing in the morning would be in the bank. It was taken out of the debit balance plus the clearing.

The COURT: I will allow you to show the actual method of computing interest.

Mr. ROBINSON: But not the reason.

The COURT: But not the reason. In other words, I think I must limit the counsel for the defence to what was done at these dates. I will exclude merely agreements or arrangements. You may call your other witness or prove by Mr. Potter what you desire to prove about the interest before resuming this line of examination.

(The jury was called in.)

ASA P. POTTER resumed.

(By Mr. HOPKINS:)

Q. I will ask some questions in connection with the offer
135 already made. Your honor has already excluded the question.

Did you have any conversation with Irving A. Evans prior to June and July, 1891, as to overchecks?

Mr. ROBINSON: That has been excluded once, I think.

The COURT: One moment. I think that was answered yes or no. You may put the question.

Q. Did you have any conversation with Irving A. Evans prior to June and July, 1891, as to overchecks?

The COURT: He may answer that yes or no.

A. Yes.

Mr. HOPKINS: Now, my question is, give that conversation.

Mr. ROBINSON: I object to that.

The COURT: The stenographer will note the objection. I will exclude it on the ground already stated, that I must limit the case as it now appears to what was actually done, as shown upon the

books of the bank, on the ground that the case must show an actually existing deposit.

Mr. HOPKINS: I take exception.

Q. Now, I ask this question as bearing upon the same conversation: Was such a conversation communicated to the cashier and to a majority of the directors of the bank?

Mr. ROBINSON: I object.

The COURT: That is excluded for the same reason.

Mr. HOPKINS: Exception noted on the same ground.

Q. What do you know in regard to the depositing of money by Irving A. Evans & Co in the Maverick bank from day to day?

Mr. ROBINSON: Wait a moment.

The COURT: It is excluded.

Mr. HOPKINS: Note my exception.

The COURT: One moment. Does that question bear upon the same subject-matter you have been talking about?

Mr. HOPKINS: Yes, your honor; that is to say, the conversation in regard to the necessity of having deposits, that I opened in my offer.

The COURT: Then I exclude it.

(Mr. Hopkins excepted.)

Q. I will ask another question: Whether or not you knew there were deposits of money by Irving A. Evans & Co. in the Maverick bank made from day to day?

Mr. ROBINSON: I object to that.

Mr. HOPKINS: In the same connection.

The COURT: If it is in the same connection, I exclude it. If it is not in the same connection, I admit it.

Mr. HOPKINS: The books would show it. I offer it in connection with what I have already said, because the books show the facts.

The COURT: I exclude it.

Mr. Hopkins excepted.

Q. I now ask the witness: At the time of the certification of Exhibit A, what knowledge had you as to whether there was a deposit to meet it? And I state to the court that I expect to show no other deposit than the books have shown, but it is the knowledge of the witness.

The COURT: You may answer that question.

136 Mr. ROBINSON: It has no connection with the other matter, I understand.

The COURT: No; I understand that.

A. Please ask that again.

Q. At the time of the certification of Exhibit A—that is, the check for $2,450, on which one of the counts in the indictment is based—at the time of the certification of Exhibit A, what knowledge had you as to whether there was a deposit to meet it?

A. I had a knowledge of the rule of our bank——

Mr. ROBINSON: Wait a moment.

Mr. HOPKINS: The question is about whether there was a deposit of Evans & Co. when that check was certified.

A. Well, I knew there was a deposit there.

Mr. HOPKINS: Now I ask the witness what was your belief in regard to your right to certify a check as against that deposit.

Mr. ROBINSON: Wait a moment.

The COURT: Of course, it is excluded.

Mr. Hopkins takes exception.

Q. In regard to Exhibits B, C, D, & E, which are the other four checks in the indictment, and in regard to each of them, I want to ask you, if at the time of the certification of each of these exhibits, what knowledge had you whether there was a deposit?

A. I knew there was a deposit to meet them.

Q. And I will ask you again whether in each of those certifications it was your belief that you had a right to certify against that deposit.

Mr. ROBINSON: That, of course, is excluded.

The COURT: That is excluded.

Mr. Hopkins excepts.

Q. What, if anything, Mr. Potter, did you know about any application by the bank of the deposit made from time to time during the day to meet certified checks or other application of those deposits?

Mr. ROBINSON: I do not think that is competent.

The COURT: I do not think it is competent in that form, Mr. Hopkins. You may ask him generally what he knew about the application of the deposits.

Q. What did you know about the application of deposits made in the bank?

The COURT: On those particular days. Put the question in form first.

Mr. HOPKINS: Inasmuch as the overdraft has been allowed in the case for the months of June and July——

The COURT: Please put the question.

Mr. HOPKINS: My question was whether he knew in regard to the application of the deposits made from day to day by the bank, and I limit the question.

The COURT: If you want to open the door, I will open it for you; but so far as I excluded everything but overdrafts that appeared at the beginning and end of business on each of those three days, I don't think there is any evidence here in this case as to the deposits made on other days. I may be mistaken about it. I think
137 either I misapprehend or you misapprehend the state of the testimony.

Mr. HOPKINS: I understood that the fact that there were deposits

at the time the so-called overdraft was in the case is in the case. If it is not, I certainly should want it in, because it would be an exceedingly——

The COURT: You may ask him first whether or not there were deposits.

Q. What do you know about that—whether there were deposits from day to day during the months of June and July?

A. There were.

Q. Now, I ask you what you knew in regard to the application of the daily deposits of Irving A. Evans & Co. by the bank during the months of June and July, including the three days, July 23rd, 24th, and 25th.

Mr. ROBINSON: Has your honor admitted that?

The COURT: I have let him put in the personal knowledge, what he knew at that time, strictly speaking.

Mr. ROBINSON: His own knowledge.

A. You mean what I knew from——

Q. What you knew.

The COURT: When I say personal knowledge I mean personal knowledge or personal information.

A. Ah! I knew that Mr. Evans was a large customer at our bank.

Q. That is only what you knew of the application of deposits?

A. They were dedicated first to the certification of checks, and what remained——

The COURT: One moment. I cannot allow this. I shall have to limit you to what he knew of what application was made of the application of those deposits on the books of the bank.

Mr. HOPKINS: I claim that this is within the entries on the books of the bank and what is already in the case.

The COURT: If you want to call out the information that he is giving now, you will have to put it in some form, but I understand your question as to what he knew of—what he knew.

Mr. ROBINSON: I suppose that part which we did hear shall be stricken out.

The COURT: Of course.

Q. Do you know, Mr. Potter, of a slip kept on the desk of the assistant to the assistant cashier upon which there were entries of deposits as they were made and of checks as they were certified?

A. I did.

Q. Did you know of any other entry upon the books of the bank during the day which dealt with the disposition or application of a deposit made during the day?

A. Yes, sir.

Q. What?

A. I knew that the book-keeper kept the account of Irving A. Evans & Co. credited over the deposits that they had made and

charged over the checks that they had drawn or the checks that had been certified and the checks that came from the clearing-house.

Q. Did you know that the certification of checks were charged upon by the cashier, or in his department, when they were made, upon the slip that bore the deposits of the day?

A. On the pad?

Q. On the pad.

A. Yes, sir.

Q. Did you know how interest was cast? I do not ask
138 you why, for I am limited to the question of how interest was cast upon the debit balances that appeared at the beginning and end of the day?

A. Yes, sir.

Q. How and when?

A. Yes, sir.

Q. How was it cast, and when?

A. It was cast by taking the amount of the debit balances in the morning, adding to that the amount that came from the clearing-house, and deducting from that the amount which was deposited before the clearing house. That result show- the sum of money that we were out of for the day.

Q. What was your knowledge and your belief, Mr. Potter, in regard to the fidelity of your subordinates in the bank in the performance of their duties?

Mr. ROBINSON: Is that important, your honor?

The COURT: I think I will allow it.

A. It was absolute.

Q. Absolutely how?

A. I had full confidence in them.

Mr. HOPKINS: Now I desire to ask this question, which I assume your honor will exclude.

Q. What was your belief as to your right to certify checks as against daily deposits with the knowledge of the debit balances that stood in Evans & Co.'s account and the condition of his account on the books of the bank.

Mr. ROBINSON: I object.

The COURT: I exclude that.

(Mr. Hopkins excepted.)

Mr. HOPKINS: I desire to ask one other question that I had put in form. You will not answer, Mr. Potter. This is just preliminary. Was there ever, prior to July 21st, 1891, any talk between you and Mr. Evans as to his deposits and certifications as they related to each other? Give the conversation.

Mr. ROBINSON: I object to that and the conversation.

The COURT: Both are excluded.

(Mr. Hopkins took exception.)

Q. Mr. Potter, what proportion, in the usual course of business, of

certified checks, in your judgment, were you called upon to certify?

A. Oh, a very small proportion; possibly $\frac{1}{10}$th of the whole.

Q. Where there checks on any particular account or for any particular customers which were brought to you for certification proportionately more than for others; if so, for what account and for whom?

Mr. ROBINSON: I object to that unless it is material to this particular injuiry, this count.

The COURT: I think the subject-matter of the question is admissible. If you object to the form, I will admit it. This is to be answered yes or no.

Q. Were there checks on any particular account or for any particular customer which were brought to you for certification proportionately more than for others?

A. No, sir.

Q. Mr. Potter, how far did you know the details of what has been called an overdraft and the Evans & Co. account on any particular given day before July 25th, including July 25th?

Mr. ROBINSON: I do not object, but that opens something that has already been excluded several times. If it does, I must object to it.

139 The COURT: I understand it is limited to what appeared on the papers or books of the bank.

Mr. ROBINSON: Then I do not make any objections.

Mr. HOPKINS: I am asking how far he knew on any day.

A. I did not know the precise details daily.

Q. As to the method, course of business, in the certification of checks, what did you know about that?

Mr. HOPKINS: I desire to see if your honor will allow the question in that form—whether it was anything different from what was testified to before.

The COURT: I think you have a right to show what his knowledge or inclination was.

A. I knew the method that has already been testified to here. I knew that and approved—in fact, had something to do with it.

Q. Anything that has not been given in evidence in regard to it, did you know?

A. I think not. I think it has all already been fully explained.

Q. I want to call your attention to some conversations that have been testified to by Mr. Bliss as having been held with you. What do you say about having had those conversations with Mr. Bliss, or any of them?

A. I think Mr. Bliss is mistaken as to the date of those conversations. I think they occurred subsequent to the dates he fixed.

Q. How much later?

A. He fixed them in June and July—two conversations in both of those months. I don't think they did occur until in September; that is my impression.

It appeared in evidence that the defendant knew the method or course of business in the certification of checks that has been previously testified to and is recited herein.

It appeared in evidence that all deposits made by Evans & Co. were regularly entered to the credit of Evans & Co. upon the books of the bank in the regular course of business.

It appeared that certified checks were only paid through the clearing of the day next after the certification, but were charged against the account of the drawer at once on delivery of the certification, and that this was true of the five checks set forth in the indictment.

It appeared in regard to Evans & Co.'s checks there was no different practice as to method of certification from the usual one used.

The following is a copy of the account of Irving A. Evans & Co. with the Maverick National Bank on the 23, 24, and 25th days of July, 1891, as it appears upon the banks and banker's book kept by Mr. Moore, one of the book-keepers.

(Here follows table marked p. 139½.)

140 The following is a copy of the account of Irving A. Evans & Co. with the Maverick National Bank on July 23, 24, and 25, 1891, as it appears upon the deposit book of Irving A. Evans & Co. with the bank. There was evidence tending to show that the deposit book was balanced daily and was verified.

1891.	Checks.	Deposits.	Totals.	Balance.
				178,166 01
		50,000		
		85,363 62		
July 23.....	157,261 97	12,100		
		55,000	147,463 62	187,964 36
		6,770		
24.....	130,613 99	55,551 20		
			117,321 20	201,257 15
25.....	.....	50,000		
	132,717 59	93,119 27		
			143,119 27	190,855 47

At the close of the evidence the defendant asked the court to instruct the jury as follows:

3. That as to each and all of the counts of said indictment there is a variance between the allegation in each count that then and there, at the very moment of certification, the check was "of the fol-

lowing tenor," a copy of the check being given without any certification thereon, and the check produced in evidence, which showan alleged certification thereon.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

4. That the words "then and there" in said indictment and each count thereof are either used distributively as meaning and relating to two different periods of time, and that said indictment and each count thereof set forth no offence against the laws of the United States, and that the same be quashed, or that the said indictment and each count thereof sets forth the check set forth therein as both certified and uncertified at the same moment of time as coexistent with each other, and each count is bad for repugnancy.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

5. That as a matter of law, as a prerequisite to the creation of a valid certification by the Maverick National Bank of Boston, the vote of said bank required as an integral part of said certification *and* countersigning by the paying teller; that the alleged certifications as set forth in the indictment and each count thereof do not set forth any countersigning by the paying teller; that as a matter of law neither the indictment nor any count thereof sets forth a valid certification by the president of the bank.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

141 6. That as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party with notice of the same, the vote of said bank required as an integral part of said certification the countersigning by the teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamped words "—— ——, paying teller;" that the said words, "—— ——, paying teller," stamped upon each check, would affect any holder of said check with notice of said vote and requirement; that there is a variance between the allegation in each count that the certification was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote that such countersigning was a prerequisite of valid certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

7. That as a matter of law, as a prerequisite to the creation of a valid certification by the Maverick National Bank of Boston, the vote and custom of the bank required as an integral part of said certification the countersigning of the paying teller; that the alleged certification, as set forth in the indictment and each count thereof, did not set forth any countersigning by the paying teller; that as a matter of law neither the indictment nor any count thereof sets forth a valid certification by the president of the bank.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

8. That as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party with notice of the same, the vote and custom of said bank required as an integral part of said certification the countersigning by the paying teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamped the words "—— ——, paying teller;" that the said words "—— ——, paying teller," stamped upon each check would affect any holder of said check with notice of said vote and custom of the bank and requirement; that there is a variance between the allegation in each count that the certification was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote and custom of the bank that such countersigning was a prerequisite of valid certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

9. That neither of the counts of the indictment sets forth any offence against the laws of the United States, in that each count simply alleges a certification by writing, putting, and placing certain words upon a check, and fails to allege delivery of the
142 certification by the bank or the communication of that writing in any way, shape, or manner to any person, and that such delivery or communication is an essential element of the act of certification, and the failure to allege the same renders each count so far defective that it sets forth no offence against the laws of the United States.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

10. That where an agreement is made between a bank and its depositor that an overdraft is to be treated between the parties as a loan and interest is charged upon the same, and the deposit is then made in the bank by the depositor to his account, and the said deposit is entered to the credit of the depositor upon the books of the bank, the officers of said bank may lawfully certify checks drawn by the depositor not exceeding in amount the amount of such deposit prior to the withdrawal of said deposit by the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

11. That where an agreement was made between a bank and its depositor that an overdraft is to be treated between the parties as a loan and interest is charged upon the same and the account of the depositor is balanced at the end of each day, which balance shows the state of the account at the morning of the next day, and a deposit is then made on such day by said depositor to his account, and the said deposit is entered to the credit of the depositor upon the books of the bank, the officers of the said bank may lawfully

certify upon such day checks drawn by the depositor not exceeding in amount the amount of such deposit prior to the withdrawal of said deposit by the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

12. That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and he shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

13. That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor, and if the depositor's account is balanced at the end of the day, which balance shows the amount of the overdraft loan at the beginning of the next day, and if during such day a deposit is made by the depositor in the bank to the credit of his account, entered upon the books of the bank to the credit of the depositor, until the same has been withdrawn by drafts against
143 it such deposit may be lawfully applied by the bank to the certification of the depositor's checks.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

14. That where a deposit is made by a dealer whose account is overdrawn by agreement with the bank that he may overdraw not exceeding a limit of $200,000, and that interest may be charged upon such overdraft, and after such deposit is made and entered to the credit of the dealer, and before the same has been drawn out by the dealer, a request from such dealer to certify checks to an amount equal to or less than the amount of such deposit, and the certification of the same is an application both by the dealer and by the bank of the deposit to the check certified.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

15. Where a dealer's account is overdrawn by agreement with the bank that he may overdraw not exceeding a limit of $200,000, and that interest may be charged upon such overdraft, and the dealer's account is balanced at the end of the day, which balance constitutes the balance at the beginning of the next day, and during such day a deposit is made by the dealer and entered to the credit of the dealer, and after such deposit is made and entered, and before the same has been drawn out by the dealer, a request from such dealer to certify checks to an amount equal to or less than the amount of such deposit, and the certification of the same is an

application both by the dealer and by the bank of the deposit to the checks certified.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

15*a*. That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor, and a deposit then made to the account of the dealer, which is entered up to the credit of the dealer upon the books of the bank, and against which deposit and with reference to which deposit a check or checks for an amount equal to or less than the amount of such deposit are certified by the president of the bank, all being done in the regular course of business, the assumed facts exclude any criminal intent on the part of the president.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

16. The above facts assumed in the last request exclude any violation of the statute by the president in making such certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

17. That the entry by a depositor, made upon a deposit slip which is handed to the bank by the dealer with an accompanying deposit and received and held by the bank as such, and is preserved among the papers of the bank, and which is used in the bank to make other entries on the books of the bank, becomes by
144 delivery to the bank an entry upon the books of the bank to the credit of the dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

18. That the entry of deposit upon a prepared block or memorandum paper, called in this evidence schedule of balances, kept by the bank in the department of the cashier, to the credit of the dealer, in the regular course of business, is an entry regularly made upon the books of the bank to the credit of the dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

19. That when a bank has allowed a dealer to overdraw his account by express agreement between the bank and the dealer that the said dealer may overdraw his account at any time until notified to the contrary, to an amount not exceeding $200,000, that the transaction shall constitute a loan, and that interest shall be paid upon the same, and the account is balanced at the end of the day, which balance is the balance at the beginning of the next day, and when deposits are subsequently made on said last-named day by the said dealer and entered to his credit upon the books of the bank, and the president of the bank certifies the checks of the dealer upon said last-

named day to an amount not exceeding the deposits so made on that day, honestly believing that he has a legal right to do the same, that the above facts exclude any criminal intent upon the part of the president in making the said certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

20. Assuming the facts stated in the last request, any wilful violation of the statute by the president in making such certifications is excluded.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

21. That when deposits are made in a bank by a dealer and the same are regularly entered to the credit of a dealer upon the books of the bank, and the president of the bank, honestly believing he has a legal right so to do, certifies checks of the dealer to an amount not exceeding the deposits of the dealer on said day, before the said dealer has otherwise specifically withdrawn the said deposits, then the above facts exclude any criminal intent upon the part of the president in making such certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

22. Assuming the facts stated in the last request, any wilful violation of the statute by the president in making such certification is excluded.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

23. That when in the regular course of business it is the duty and practice of a particular clerk of the bank, such clerk being a suitable and proper person and properly qualified for the performance of his duties, when a check of a dealer is presented for certification to the bank to examine the account of the dealer to see whether the dealer has on deposit, entered to his credit
145 upon the books of the bank, such as amount as will legally authorize the officers of the bank to certify such check, and when it is the duty of the clerk in the regular course of business, after such examination of the dealer's account and after having satisfied himself of the existence of such facts, to present the check for certification, first, to the assistant cashier, if he be present in the bank; second, to the cashier, if the assistant cashier is absent, and, third, to the president, if both of the cashiers are absent, and the president thereupon, relying that the clerk has done his duty, certifies the said check when brought to him by the clerk, said president not personally knowing what deposits have been made that day by the dealer and regularly entered to the credit of the dealer upon the books of the bank other than by the due course of business, that the above facts exclude any criminal intent upon the part of the president in making such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

24. Assuming the facts stated in the last request as true, they ex-

clude any wilful violation of the statute on the part of the president in making such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

25. That when a debit balance appears on the dealer's account on the books of the bank at the beginning of a day, and during the day deposits are entered to the credit of the dealer upon the books of the bank, and during the day, and prior to any balancing of the dealer's account and prior to any withdrawal of the same by the dealer, checks are certified by the president of a bank, in reliance upon such deposits, to an amount not exceeding the amount of such deposits, which checks when certified are charged against the dealer's account, the certification of such check is an application by the bank of the deposit to such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

26. That when a debit balance appears on the dealer's account on the books of the bank at the beginning of a day and during the day deposits are made by the dealer and the same are not withdrawn by the dealer, and prior to any balancing of the dealer's account for that day the dealer has on deposit with the association an amount of money equal to the amount of said deposits, and the officers of the bank are legally authorized to certify checks drawn by the said dealer to an amount equal to the amount of such deposits.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

27. That when an agreement exists between the bank and dealer that an overdraft shall be a loan, and that the dealer may overdraw his account up to a certain limit, and interest shall be charged upon the same, and in pursuance of such an agreement the dealer overdraws his account not exceeding the said limit, and while such overdraft exists, pursuant to such agreement, deposits are made by the dealer and are not withdrawn by the dealer, the dealer has on deposit with the association an amount of money equal to the
146 amount of the said deposits, and the officers of the bank are legally authorized to certify checks drawn by the said dealer to an amount not exceeding the amount of such deposits.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

28. That when an agreement exists between the bank and a dealer that an overdraft shall be a loan, and that the dealer may overdraw his account up to a certain limit, and interest shall be charged upon the same, and in pursuance of such an agreement the dealer overdraws his account, and his account is balanced to determine the amount of overdraft at the end of each day's business, and while such overdraft exists, pursuant to such agreement, deposits are made during the day by the dealer, and before the same are withdrawn by the debtor the president of the bank, believing that the dealer has on deposit with the said association the amount of such deposits, and that he is lawfully authorized to certify the checks of the dealer to an amount not exceeding the amount of such deposits, does cer-

tify the checks of the dealer to an amount not exceeding the amount of such deposits, the above facts negative any criminal intent upon the part of the president in certifying the said checks of said dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

29. Assuming the facts stated in the last paragraph, they negative any wilful violation of the statute by the president.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

30. That when a debit balance appears on the dealer's account on the books of the bank at the beginning of the day, upon which interest is charged, and the account is not balanced until the end of the day upon the books of the bank, and during the day deposits are made by the dealer, and the president honestly believes that the depositor has on deposit with said association the amount of such deposit, and that he has a lawful right to certify checks of the dealer to an amount not exceeding the amount of such deposit, and does so certify such checks, the above facts negative any criminal intent upon the part of the president in such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

31. Assuming the facts stated in the last paragraph, they negative any wilful violation of the statute by the president in such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

32. Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether the facts exist which shall lawfully authorize the certification of a check before bringing the check to an officer of the bank to certify, and such check is so brought to the officer by the clerk for certification, the certifying officer has a right to rely that the clerk has done his duty in the premises and to certify the said check.

147 The court refused to so instruct the jury, and the defendant excepted to such refusal.

33. The existence of the facts stated in the last request negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

34. The existence of the facts stated in the last request negatives any wilful violation of the statute by the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

35. Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether all the facts exist which shall lawfully authorize the certification of a check before bringing the check to an officer of the bank to certify, and the certifying officer knows that the account of the dealer has been overdrawn by agreement that such overdraft be a loan, and knows that deposits have been

made by the dealer on the day in question, but is ignorant whether the amount of the deposits exceed the amount of the overdraft and the check at the particular moment the check is brought to him, the certifying officer has a right to rely that the clerk has done his duty in the premises and to certify the said check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

36. Assuming the facts stated in the last-named request, they negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

37. Assuming the facts stated in the last-named request, they negative any wilful violation of the statute by the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

38. Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether all the facts exist which shall legally authorize the certification of a check before bringing the check to an officer of the bank to certify, and the certifying officer knows that in June and some time in July an overdraft has existed in the account of the dealer, and knows that deposits have been made by the dealer, but is ignorant whether the deposits on July 23, 24, and 25, at the moment any check is brought to him, exceed the amount of the overdraft and the check, he has a right to rely that the clerk has done his duty and to certify the check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

39. Assuming the facts stated in the last-named request, they negative any criminal intent upon the part of the certifying officer.

148 The court refused to so instruct the jury, and the defendant excepted to such refusal.

40. Assuming the facts stated in the last-named request, they negative any wilful violation of the statute upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

41. That if the defendant believed he had right to certify against deposits of the day when an agreed overdraft existed, this belief negatived any criminal intent.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

42. Assuming the facts stated in the last-named request, they negatived wilful violation of the statute.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

43. The word "wilfully" in this indictment means not simply that the defendant certified the checks in question "voluntarily," but that he did it with a bad purpose or with an evil intent, and in this case must be construed to imply an intended design to certify

the checks in question or some one of them when he had no lawful right so to do.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

44. The question whether the bank made an application of the daily deposits to the debit balances or otherwise is a question of fact for the jury.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

45. The law will not apply payments according to the presumed interest of the parties except where an application has been made—

1st. By the debtor;

2nd. By the creditor; or,

3d. By agreement between the debtor and the creditor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

46. It is lawful for a bank to permit a withdrawal of deposits made by a depositor who owes the bank a demand and overdue debt.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

The court charged the jury as follows:

Mr. FOREMAN AND GENTLEMEN OF THE JURY: What I have to say to you will not be attempted in a philosophical way, because on reflection I am satisfied that I can make my rulings more clear to you and be myself less liable to err if I treat all the questions which are now before you by topics. While the counsel in this case have each of them maintained with earnestness and with strictness the rights of the contending parties, I am happy to say that in my view they have kept strictly within their province and made no
149 attempt to deal falsely with facts or law or jury or the court.

Their conduct of this trial has been such as to reflect credit upon them and honor on the court, and is such as deserves to serve as an example to those who have witnessed it; and it is also to the credit of the people of this Commonwealth and of this locality that, in a matter attaching to questions of so much public interest as you must know this does no attempt has come into this court-room or been made outside of it to persuade the court, the jury, or the counsel to dispose of this case except in accordance with the law and the evidence under law.

Your oath, gentlemen, you remember well. It is that you will well and truly try the issue between the United States and the defendant at the bar according to the law and the evidence given you; and while it is customary, or certainly common, for the court to remind the jury of their duties under their oath, yet under the circumstances which I have spoken of, and witnessing your own demeanor during the trial, I deem it unnecessary, except to call your attention to your oath and its terms—an oath as solemn as that which binds the court. I assume that you will dispose of this case according to the law and the evidence, as your oath requires.

But, gentlemen, I must, notwithstanding this, call attention to your duty to analyze this case, and urge upon you that whatever your intentions to guard your oath faithfully, you cannot do it if you allow your minds to mistake the issues which are here on trial. You must, therefore, carefully examine and scrutinize your own minds, and select out from impressions, general impressions, of what is now on trial, by a close analysis, the mere issues in the case, according to the facts and the rules of law which will be given you. You understand, gentlemen, that in this court, as in the courts of your own Commonwealth, you are in criminal cases the final arbiters of the facts, but you must accept the law from the court, and you must accept it without qualification, absolutely, and as given to you. If the court errs in the law the defendant certainly has his remedy in the Supreme Court of the United States; but if you assume to determine the law and determine incorrectly, there is no remedy. It is also the practice of the Federal courts and it is the right of the Federal judges to comment upon the facts and to express to the jury the views of the court and of the judge touching the facts, so far as the court or the judge deems it necessary so to do in order to accomplish the ends of justice, it being, of course, always in criminal cases the duty of the court or judge to let the jury understand that, notwithstanding the views which the court or the judge may have of the facts, the jury are the final arbiters of the facts and are to determine them according to their conscience and their oaths.

I do not know that during the course of what I have to say to you I shall comment upon the facts to any considerable extent. The thoroughness of the presentation of this case upon either side and the time and care which have been given to its trial will relieve me probably from this necessity. But, gentlemen, in the event that I should happen to do so in the course of what I say to you, I make this observation so that you will understand that while you are to take the law absolutely from me, the facts
150 you take from me only so far as you may consider my observations or my suggestions are worthy of reception by you; and the facts are to be finally settled by you independently of any tendency or conclusions of my mind which you may think you observe. Now, gentlemen, in civil cases, where the issue is between party and party, touching the rights of property or alleged torts or the enforcement of promises, the jury may determine the issue by a mere preponderance of evidence. Let the weight one way or the other be as light as possible, it is sufficient, provided that the jury all see the preponderance is in the same direction. In cases of private rights the issue must be determined in one way or the other; it must be settled. But it frequently happens that it cannot be except by a mere preponderance of evidence, and therefore, as it must be settled, the law allows it to be by such mere preponderance. But in criminal cases there is no necessity that the person charged with crime shall be found guilty; and for this reason, and also out of the tenderness of our laws to persons charged with crime, and to make sure that the old proverb is regarded, that it is better

that ten guilty men should escape than that one innocent man be convicted, the law holds that, so far as the United States in criminal proceedings desire to convict, it must prove beyond a reasonable doubt every allegation in its indictment and every fact necessary to constitute the offence. There have been many attempts made to define the words "reasonable doubt." I will not undertake myself to explain them, and will read to you the language of a Federal court adopted and approved by the Supreme Court of the United States: "The law presumes a defendant innocent until proven guilty beyond a reasonable doubt; that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt."

"A reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

The rule prevails, as stated at the opening of what I read to you, that the defendant charged with crime is presumed to be innocent until proven guilty beyond a reasonable doubt. Counsel for the United States has correctly stated the rule, that the laws of the United States, as do the laws of the State, throw about a person charged with crime the presumption of which every citizen is entitled to receive the benefit—a presumption that he stands fairly in the community, that he is innocent of the offence charged against him. The fact that there have been preliminary proceedings do not weigh a pound's weight against that presumption, and you are to start
151 in this case and with this defendant with all the presumptions in his favor that you would give the ordinary citizen of good standing in the community. Not only that, gentlemen, but upon this point there are two or three minor matters which I will dispose of here. There has been some evidence brought into this case that this bank failed after these transactions with Evans & Co; that Evans & Co. failed. If those matters had been offered as essential facts in this case for the purpose of influencing your judgment, I should unhesitatingly have ruled them out. So far as you know, this bank never lost one dollar by Evans & Co.; and whether it lost anything by Evans & Co., or whether Evans & Co. failed, and whether the Maverick National bank failed are not of the slighest consequence. So far as all these matters are concerned, you are to stop with the last check upon which this indictment is based, and you are to take this defendant precisely as you saw him on the 25th day of July, 1891—a president of a large bank in the city of Boston. Treat him as such and as you found him

then. On the other hand, the position taken by the counsel for the United States is perfectly correct; this statute is a law for the regulation of banking business; its provisions are arbitrary, but are to be obeyed; and yet, they are of that character that while the United States must prove knowledge and wilfulness, it is not necessary that the United States should prove that the defendant was guilty of a corrupt purpose, guilty of moral turpitude, guilty of fraudulent intent, or guilty of an injurious purpose, except so far as the word injurious is a technical word and implied in every unlawful act by force of law. A conviction of an offence under this statute does not imply that the defendant has been guilty of any of those things, although the maximum penalty is so large that there may be an opportunity for considering such things upon hearing the facts pertinent when sentence is pronounced. But here there are no considerations of that character whatever. The offence under this statute may be committed under such circumstances as need not imply any of these things. Certainly it is not for the United States to prove them, and the United States are perfectly right in saying that they are not bound to prove any of these corrupt purposes.

Now, gentlemen, I will come to the case itself somewhat closer and read you the statutes upon which this proceeding is based, so far as it is necessary for your attention to be called to them. The act of 1869—I think it was March 4th, 1869—now a part of the Revised Statutes, sec. 5208, enacted, "It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association in violation of this section shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section 5234"—that is to say, for violation of that section of the law the comptroller might proceed to forfeit the charter of the association,
152 but as the law stood there was no penalty except that; there was no penalty upon the officer of the bank or the bank itself except the liability of its charter being forfeited. I do not know that we need go into the purposes of that statute to any extent at this time. I do not know that I know all the purposes of that statute, or that any one knows them. There was about the same time, and probably growing out of the same transactions, a statute passed prohibiting national banks from loaning on legal tenders or national bank bills—perfectly good security, none better. This statute in part grew out of certain transactions in which there had been large certifications of checks against deposits of gold certificates; so it is very plain that the statute did not have in view only the prevention of losses by banks, but also the prevention of enormous speculations which grew out of certain methods in the New York banks in relation to the certification of checks.

Incidentally, however, it does operate to protect the banks from loss by the certification of checks; and while it was perhaps based largely upon an intent to accomplish a great public purpose, incidentally it used the language which reaches cases like this now presented to you. As I say, that statute imposed no penalty upon any officer of any corporation, and it stood in that way until 1882. In it the word "willfully" did not occur. It is not necessary to consider whether or not the association was liable for the acts of its officers made through negligence or carelessness or not. That question does not now arise. I simply call your attention to the facts that the word "willfully" does not appear in that statute, and that it did not impose any penalty upon officers of corporations. In 1882 Congress passed the following additional act: "That any officer, clerk, or agent of any national banking association who shall willfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March 3rd, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than $5,000, or shall be imprisoned not more than five years, or both, in the discretion of the court."

Now, you will notice, gentlemen, that this not only provided for the punishment of the officer who wilfully violated the act of 1869, but also brought in something more—the officer who should resort to a device; there is no count based upon that; "or who shall certify before the amount shall have been entered to the credit of the dealer;" there were counts based upon that phraseology, but they have been nolleprossed; so that all we have to do with now is the phraseology of the original act of 1869, turning largely upon the expression "unless the person or company drawing the check has on deposit with the association at the time such check is certified an amount of money equal to the amount specified in such check."

153 Now, that is the law of the land, which you and I have taken an equal oath, equally solemn, equally binding, to enforce. It is not for us to question its wisdom, but to accept it according to its fair intent, and do our duty under the statute in such a way as to receive the commendation of our own consciences, and hold ourselves responsible to nothing else—you and I alike. Some questions arose touching the construction of this phraseology: "Unless the person drawing the check has on deposit at the time the check is certified an amount of money equal to the amount specified in such check." I will instruct you that this does not mean that there shall be the precise amount of money there; it is not to be taken literally; but there is to be on deposit money enough to cover the check. There is also, perhaps, some question concerning the meaning of the words "on deposit" and "money on deposit." I will come to this again hereafter; but for the present

I will say as to the word "money" that it does not mean cash in the strict sense of the word. It means checks; it means anything that is recognized among persons dealing with banks and between banks as money; and if Evans & Co. deposited with the Maverick bank checks which were received by the bank as money and credited to Evans & Co. as money, it is "money" and goes in to make up this balance of money under this statute, unless the Government shows, which is not done in this case by any proper evidence—unless the Government shows that what went in there and was accepted apparently as money was known by both parties to the transaction, both Evans & Co. and the officers of the bank, not to be an equivalent of money, to be sham checks or sham assets. I do not hesitate to instruct you that it is my opinion, gentlemen, that upon the evidence in this case whatever has gone into this bank to the credit of Evans & Co. is to be taken as money, except, of course, the checks of Evans & Co., which they seem to have redeposited, for aught we know, for the purpose of cleaning up their check book—a transaction perfectly consonant with honest dealing. Of course such deposits would not count as money if it came down to close figuring. They might offset transactions on the other side; but I don't think you will be troubled by that question. Whatever was accepted in good faith by the bank as money is to be taken by you as such.

I desire, in reference to the numerous counts in this indictment, to say: In cases where facts are complicated or the law doubtful, it is customary for prosecuting officers to allege the same offence in several different counts, for the purpose of describing it in different ways to meet the possibilities of the evidence and the rulings of the court. Therefore, although in this indictment there are numerous counts, only five checks are made its subject-matter, the various counts alleging the facts with reference to them in different ways.

As the evidence has developed, the United States does not rely on counts 5, 6, 13, 14, 21, 22, 29, 30, 37, 38, and therefore on those counts your verdict must be for the defendant.

In like manner the United States, not knowing whether the facts would prove that there were any real partners in the firm of Irving A. Evans & Co. except Mr. Evans, have, through the indictment, run two sets of counts, the first describing the checks
154 as drawn by the partnership of Irving A. Evans & Co., and the second as drawn by Mr. Evans under the style of Irving A. Evans & Co. I presume you will find in this case that the checks were drawn by the partnership; so that if you find the defendant guilty it must be upon one or more of the counts carrying uneven numbers, namely, 1, 3, etc., and if you so find that the checks were drawn by the partnership in which Mr. Evans was a partner, with either partners, you must find for the defendant on all the counts running with even numbers, 2, 4, 6, etc.

With reference to the remaining counts, as to which I have not specifically spoken, I instruct you that they are for the present purposes essentially the same, and that the differences in the allegations

upon the state of the evidence are unessential; so that if you find against the defendant on the first count you are at liberty to return a general verdict against him upon all the other counts of the indictment, except those as to which I have advised you you must return a verdict in his favor, or you may return a verdict against him on a part thereof, specifying the numbers, and in his favor the balance. The last counts in this indictment have been nolleprossed, so you will not be troubled with any counts beyond the 40th.

Now, I think I will take the first count and ask you to travel through it with me. This count says that "on the 23rd day of July, 1891, at Boston, the defendant was an officer in the Maverick National bank—that is, president of the Maverick National bank—which said association had been theretofore duly organized and established and was then and there duly existing and doing business as a national banking association, at said Boston, under the laws of the United States of America." I suppose I need say nothing about that part of the indictment. You have heard some testimony tending to show that Mr. Potter was president and there was conversation among counsel in which they offered to admit he was president, and you have the right to take into consideration the statements you have heard. I think there has also been proved in this case that this was an authorized bank. Then the court says that Potter was duly authorized to lawfully certify checks. Now, as far as the words "duly" and "lawfully" are concerned, I instruct you not to trouble yourselves. Now comes an allegation that "Augustus C. Jordan was then and there paying teller of said association, and was duly authorized to authenticate the certification of checks drawn upon said association when said check had been certified by the president of said association;" and in the same connection we have an allegation that "said Jordan immediately thereafter, on the said 23rd day of July, did write, place, and put on said check, under the letters 'A. P. Potter, pres.,' and before the words 'paying teller,' the initials of him, said Jordan—that is to say, 'A. C. J.'—in token that he, said Jordan, as such paying teller, then and there authenticated said certification of said checks." Those allegations which state that Mr. Jordan was authorized to authenticate and did authenticate checks I do not think require your consideration. I shall touch upon the matter of Mr. Jordan in another connection, but I may as well do it in connection with the allegation that "said Potter as said president was then and there authorized by
155 said association to certify checks drawn upon said association." The point is taken by the defendant that Mr. Potter had not power alone to certify checks; that in order to certify checks to bind the bank the signature of the paying teller was also necessary, or his initials. I will define that hereafter; but if you find such to have been the fact, you will render a verdict of not guilty upon this entire indictment, because then there is, or would be, a variance in the proof. If you should find the facts to be as claimed by the defendant on this point, it is enough for me to say that, for reasons touching the allegations of the indictment as appearing in

the light of the evidence in the case, you must render a verdict of not guilty upon this entire indictment.

I ought to explain what it meant in this connection by the authority of the president to bind the bank by certification. In the first place, I have no reference to the obligations of the bank to a third person who might innocently purchase or obtain a check certified by the president in ignorance of the by-laws or course of proceedings of the bank or of the actual authority which the president was, by the practice of the bank or the votes of the directors, empowered to use. Neither is it a question whether checks without the authentication of the paying teller would be good delivery at the clearing-house. Probably, if this by-law was posted at the clearing-house, checks not authenticated would not be good delivery. I do not know about it, and neither you nor I need trouble ourselves about that. What I mean is this, to state it as accurately as I can: If the president of this bank, according to the vote of the directors and the course of business of the bank, was not authorized to certify these checks as between the bank and others knowing all the facts without the authentication of the paying teller, so that as to persons who knew all the facts the certification would not bind the bank without the authentication of the paying teller, this indictment cannot be sustained, and you must find a verdict for the defendant. Now, upon that point the United States put in the vote of the directors "that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, provided the bank has any funds for the amount of said checks when the same are presented." Here comes the clause which is so important in this case: "All such checks, when certified, to be countersigned by the paying teller." Now, gentlemen, if the case stood upon that vote alone, so that it was a pure question of law for the court to instruct you about, I should advise you that that vote was merely directory, and that the bank was bound by a certification, although the check got out without the authentication of the paying teller, and that the fact that the indictment does not allege with reference to the certification other than it does allege on this point, and the fact that the United States have not proved other than it has proved upon this point would afford no defence. I instruct you that, *prima facie* upon this vote, such is the state of the law with reference to this case; but this is a criminal case and I cannot take the fact from you, and you are entitled to bear in mind that any vote of the directors establishing a certain order of things upon this point
156 or any other is controlled by the course of business at the bank and must be practically construed in the light of the course of business at the bank, and if on the proofs in this case altogether, taking this vote with the rest, you are not satisfied beyond a reasonable doubt that the president was authorized to bind the bank by his certification, you must find a verdict for the defendant upon the whole indictment. You are to consider in this connection whether the act of the paying teller, either as required by this vote or as practised in the ordinary course of business at the bank, was anything more than for the purpose of enabling him to keep a rec-

ord of the checks that were certified, in order that he might know the state of the accounts of customers of the bank, or whether it was for the purpose of uniting with the president in binding the bank by a joint certification or by the joint act of him and the president. I can only say, gentlemen, that if you find in the practice of the bank something which, taken with this vote, leaves upon your mind a reasonable doubt upon this branch of the case, you must return a verdict for the defendant. In other words, the United States, taking this vote and what appears here concerning the course of business at the bank and other facts laid before you touching this matter, must prove this part of the case in connection with others beyond a reasonable doubt.

The next allegation touches the act of the president certifying the check. I will pass that by for the present. Then the count in the indictment sets out the form of the check as it was when it was certified, but I believe the United States have proven the check to be in the precise form as in the indictment. That you will satisfy yourselves about by comparing the checks with the descriptions which you find in the various counts.

Then comes the allegation that the said persons—that is, Irving A. Evans & Co.—"did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of $2,450 in money." Now, gentlemen, what I have to say to you touching that proposition comes down, I think, practically and substantially to one question. I ask you first of all to determine whether or not the overdrafts, so called, of Irving A. Evans & Co. on the morning of these days, the 23rd, 24th, & 25th day of July, and at the evening or close of the 23d or 24th appeared on the books of the bank in the account and in the same account in which the deposits and checks of Evans & Co. were usually credited and charged, and whether this account is the ordinary deposit account, such as was kept with other depositors upon the books of the bank, making no distinction for this purpose between individual depositors and banks, although there must have been some separation in carrying them upon separate books. Then, gentlemen, I ask you to determine whether or not the checks deposited by Evans & Co. on these days or the other deposits made by them went through the regular and usual course customary at that bank with checks deposited by customers, and whether they went or not finally upon this account in which appear the overdrafts that I have spoken of; and I ask you further
157 to determine whether or not this course of business at the bank was recognized by Evans & Co. and whether or not Evans & Co. permitted corresponding entries to be made upon their pass book daily. If you find these in the affirmative, then I say to you that the question under this statute is not what was agreed to be done, but what was done; and I say to you that *prima facie* the deposits as they came in were in fact applied towards the liquidation of the overdraft which appeared each day at the commencement of

business and were thus absorbed, and that, as it is apparent and admitted that the entire amount of deposits was not equal to the overdrafts with which the day commenced, you should consider that as a matter of fact there were no moneys on deposit at any portion of the 23d, 24th, or 25th of July against which checks could be certified. But, gentlemen, it is claimed upon the other side that, notwithstanding the facts to which I have called your attention, certain deposts were set aside for the purpose of meeting or covering checks that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks were so treated by the bank as to become themselves a deposit in some form, would not sustain a defence in this case. I instruct you that the setting aside of a check temporarily or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it would not meet the purpose of this statute unless it was made itself the basis or a part of a deposit; and I instruct you, gentlemen, that unless the defence can show or does show that as a matter of fact certain checks were set aside—not a matter of agreement, not that there was an agreement to do so—but unless they show to you that as a matter of fact certain checks were set aside as a deposit, according to the proper course of business and appearing upon the books and papers of the bank as against which checks might be certified, this proposition will not avail the defence.

But, upon some reflection, I have come to the conclusion that notwithstanding Evans & Co. may have been overdrawn on the morning of any particular day and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain checks or other moneys and hold them for the purpose of covering the certified checks, it would not be any violation of the letter or policy of the statute and would be a defence. But I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable in the case to see any evidence—I do not mean to say evidence of what was intended or agreed to be done, which is not essential to this case—but any evidence that as a matter of fact any of these checks deposited by Evans & Co. did not go into the general deposit account and were not absorbed the instant they passed into the bank. Upon this branch of the case I instruct you that the burden of proof is on the defence—not proof beyond a reasonable doubt, but to satisfy you by a preponderance of evidence. If the defence does satisfy you by the preponderance of evidence that there was a segregation in fact appearing upon or shown from the books and papers of the bank—a segregation, a setting apart of certain deposits sufficient to cover the certified checks and against which the checks were certified—it is a defence in this case.

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The indictment further proceeds "that said Potter, as said president as aforesaid, did then and there, on the 23d day of July, at Boston aforesaid, unlawfully, knowingly, and wilfully certify a certain check;" and then the indictment proceeds further and describes the check and states the fact that there was no deposit

against which the check could be certified, and adds the words "as the said Potter then and there well knew."

Now, gentlemen of the jury, while I do not say that all these words in this indictment are necessary, while I do not say whether or not they all mean the same thing—I am not required to do so—I do say that the word "wilfully" is an essential part of this indictment, and the words that "the said Potter then and there well knew"—that is to say, that Potter then and there well knew that there were no funds on deposit—are necessary, and are to be proved by the United States beyond a reasonable doubt; but this part of the case offers some difficulty. To state the general proposition is easy enough, but the application of it under this statute—and I may say under any new statute—is not easy; and, therefore, being the part of the case on which I know the court would be most liable to err, I have written down the substance of what I have to say. Before I read that I wish to make one or two preliminary remarks. The word "wilfully" in this statute implies an intent. I do not say now what the intent is, but it implies an intent of some sort, and there cannot be an intent such as this statute contemplates unless there is knowledge; all of which is recognized in the indictment in the words I read to you, "that the said Potter then and there well knew." Now, gentlemen, if the case showed that the defendant here had before him at the time he certified the checks that overdraft slip and the pad upon which the deposits and checks were entered from time to time, it would be quite plain that he knew; or if, on the other hand, the case showed one of those instances which the statute or the framer of the statute probably had in mind more than the case now at bar—one of those instances where the cashier or president of a great bank arranged with a broker or dealer in the morning to certify his checks for a large amount, with the agreement that the dealer should cover them with collateral before the bank closed—then there would be no doubt upon the proposition that the president or cashier knew that he overcertified, because he agreed to overcertify. It was the very pith of the transaction; but the difficulty here arises from the fact that here the certification is an incident to what is a perfectly legitimate transaction, taken as a whole—that is, the overdraft—I mean legitimate as far as this case is concerned; and I ought to say here, gentlemen, that while I have spoken so much of the overdraft and tried to explain the application of the checks deposited to the overdraft, I ought to say that the United States are not bound to prove an overdraft; simply that there was no money. If the bank had had no transaction with Evans & Co. the Government would make out its case on that point. So, gentlemen, so far as this case is concerned, the overdraft was a perfectly legitimate transaction, and this certifying of checks came in as incident

159 to it; and right here arises the apparent difficulty of determining whether a defendant, situated as the president of this bank was, had the knowledge which the law requires the Government to prove—easily proved in this case if he had had the overdraft slip or pad before him or if he had arranged with Evans

& Co. every morning to certify their checks, with the agreement that they should cover them before the bank closed.

Touching that difficulty, the counsel have made observations on the proofs *pro* and *con.*, to which I do not think I shall be required to add, except two or three suggestions of a general character; and now I will instruct you as to the law upon the proposition as I understand it. With reference to each check upon which the indictment is based, the United States must show that at the time it was certified by the defendant he had knowledge that Irving A. Evans & Co. had not on deposit with the Maverick National bank at that time "an amount of money equal to the amount specified in the check." I have taken those words from the statute. I have already explained what they mean—that is, there was not money enough to cover the check.

This relates to the precise instant when the check was certified, and not to the condition of the account of Irving A. Evans & Co. at the beginning or close of the day on which the check was certified or at any other hour, except so far as such knowledge, if the jury find it existed, is a circumstance to be taken in connection with other circumstances which I will hereafter explain. I mean that while upon these days in question the deposits were never enough to cover the overdraft at the beginning of the day, yet on some other days which have been brought to the attention of the court the overdrafts were more than enough, so that with a varying account like this it becomes necessary for the Government to prove that the defendant not only knew of the overdraft, but that he also knew that from hour to hour and day to day that condition existed at the exact moment when the check was certified.

It is not sufficient for the United States to show that the defendant had an opportunity of knowing this fact or that in the ordinary course of his office as president it was his duty to know it, although this latter fact is a circumstance to be considered, as I shall further explain; neither is it sufficient or necessary for the United States to show that the defendant was negligent or careless in the matter; and, moreover, in view of the fluctuating or active character of the account of Irving A. Evans & Co., including large deposits and drafts during every business day, it is not sufficient to show that the defendant had knowledge of the state of the account on the morning of the day; but if the jury are satisfied that the defendant had knowledge of the condition of the account at the opening of the day, it must also be shown that he had knowledge that the deposits coming in during the day down to the instant of the certification were not sufficient to wipe out the deficiency existing at the beginning of the day and leave sufficient balance on deposit to cover the check certified at the time of certification. All these matters, as well as the other facts which the United States must prove, must be proved to the jury beyond a reasonable doubt within the
160 meaning of that expression as I have already given it to you.

In a civil case which came up in the supreme court of this State, Murray *v.* The Nelson Lumber Co., where it became necessary to prove that the directors of the corporation had knowledge

of a certain fact, the judge who tried the case ruled that in the absence of direct and positive evidence of the knowledge of the directors, jurors had the right to assume that they are doing what they were appointed to do, and that they know what they are appointed to know; but the supreme court held that this ruling was erroneous. In other words, it must be proved as a fact that the defendant had knowledge; he cannot be charged with imputed knowledge and he cannot be held guilty simply because the jury find that he had the opportunity to know.

The rule which I gave you on this branch of the case is subject, however, to one modification. If you should find that the defendant had not actual knowledge of the state of the account at the time when he certified the check upon which either count is based, and if the case proves beyond a reasonable doubt that the want of knowledge arose from the fact that, contrary to his duty, he wilfully closed his eyes and refused to see, he cannot be excused because he did not discover that for which he would not look. If you are satisfied beyond a reasonable doubt that the want of knowledge proceeded from a will to disobey the statute or from an indifference to its commands, you may find that if his acts were otherwise a violation of the statute his acts were wilfully done within its terms, and the want of actual knowledge would not be important and would not avail the defendant.

I have thus shown you that the general principle, subject to the modification which I have stated, applies to this case that, in order that there may be a criminal intent, there must be a knowledge of the facts upon which the intent can rest; but this does not apply to the knowledge of the law. In this case ignorance of the law would not excuse this defendant, even though the law be doubtful and though it be one on which courts may differ and one the construction of which is not settled. All such matters have their proper consideration in determining the amount of the penalty and with the executive. No other rule is practical.

In the language of the Supreme Court of the United States, "The breaking of the law is the crime." When every act "necessary to constitute the crime is knowingly done, the crime is knowingly committed." "Ignorance of the fact may sometimes be taken as evidence of the want of criminal intent, but not ignorance of the law." It is a necessary practical rule that ignorance of the law does not excuse.

And, gentlemen, I ought to add that, while ignorance of the law is not an excuse, sometimes ignorance of fact based upon ignorance of the law is an excuse; and if in this particular case it is true or should be found by you to be true, as claimed by the defence, that the defendant acted upon the belief that the law authorized him to certify checks against the morning deposits, and for that reason, when the question of certifying checks was before him, kept in mind only the morning deposits and was ignorant, for that reason, of the general condition of the accounts, that fact would have
161 great weight upon the question of knowledge to which I call your attention; and I ought also to say in this connection

that the United States were authorized to put in the books of this bank showing the detailed transactions upon these particular dates in question—the 23d, 24th, and 25th of July—as a part of the *res gesta*, as we call it—that is to say, they were bound to prove that there were no deposits to cover these checks, and they were therefore authorized to put in these books for the purpose of proving that fact, and to put in all the details which appear on them; but the defendant is not to be charged with knowledge of the condition of the books or with the details which appear there, simply because they are in the case for the purpose which I have described, unless there is some other evidence in the case connecting him with them. The mere fact that they are here in the case does not charge him with knowledge of their contents—a distinction which you must carefully keep in mind. Of course upon this point I am not excluding from your consideration the mere fact that an overdraft appeared on the books. You may be satisfied by such evidence, as the case shows that the defendant did know of the existence of the overdraft, and you have a right to give some weight to the fact that the overdraft appeared on the books as affording ground or presumption that the president had knowledge of it—that is to say, you are entitled to give weight to the fact that the overdraft appeared upon the books, be it greater or less, as a circumstance tending to show that the president had knowledge of its existence. I do not mean to exclude that from you.

Now, gentlemen, I have said to you that the United States must prove actual knowledge or prove the modification to which I have called your attention; but actual knowledge can be proved by circumstances, like any other fact; sometimes by remote circumstances; sometimes by close circumstances. It may be gathered from all the circumstances in the case, weighing them against each other, *pro* and *con*.

I do not intend to comment upon the circumstances which have been brought to your attention on one side or the other by counsel in this case. I do not feel it is necessary I should do so, for the reasons I have already stated to you. I will read to you the rule given by an eminent judge: "This knowledge of the defendant must be affirmatively shown by the Government. Except in the case of confession, it is generally impossible to make it out by direct evidence, and it can only be inferred from overt acts." Upon the question whether or not the defendant here had the required knowledge as I have described it to you and defined it to you, you are to take all the circumstances in the case, weigh them, and determine upon that point whether or not the United States have proved their case beyond a reasonable doubt.

Now, gentlemen, I believe I have covered all the topics at issue in this case. I think for me to undertake to sum them up would simply be a repetition or create confusion and misunderstanding, and therefore I will submit the case to you, with such corrections or amendments of errors as I may have made and to which counsel will call my attention during the short intermission which I will give you.

Will half an hour be sufficient, gentlemen?

162 Mr. HOPKINS: Quite so.

Recess of half an hour.

Counsel for the defence present the following:

Defendant notes exceptions as to the refusals to rule and to the charge.

The defendant excepts severally, as to each request, to the refusal of the court to give each and every request for ruling which the defendant made, in their terms, and he excepts to the charge of the judge so far as is inconsistent with those requests and each of them, especially:

First. As to the instructions regarding the countersigning by the paying teller.

Second. As to the instructions regarding the making of deposits and their *prima facie* absorption when entered into a single account.

Third. As to the instructions regarding the burden of proof being on the defence to show that a separation or segregation of certain deposits was made to certify against

After the recess the jury returned to their seats and were again addressed by the court.

The COURT: Gentlemen of the jury, with reference to comparing the checks with the indictment, you need compare only so much as is set out in the indictment—that is to say, you can take what there is in the indictment and compare it with the checks. You will not find the endorsements in the indictment, but compare so much as appears in the indictment. There will come to you with the papers three books, and I wish to caution you that you are only to look at the pages that have been put into the case. You are not to go through the books. Perhaps, strictly speaking, the books should be sealed up, but I think we can trust you to follow the directions of the court and examine only those pages that have been put in.

Mr. ALLEN: They are pages 23, 24, and 25.

The court took a recess at this point until 8 o'clock, at which time the jury came in with a request for explanations, after receiving which they retired, and at 10.45 the court adjourned to 9 a. m.

After the judge's charge was given and before the jury retired the defendant excepted to certain portions of the judge's charge.

The defendant excepted to that portion of the judge's charge regarding the countersigning by the paying teller as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

That portion of the judge's charge excepted to on that point is as follows:

The point is taken by the defendant that Mr. Potter had not power alone to certify checks; that in order to certify checks to bind the bank the signature of the paying teller was also necessary, or his initials. I will define that hereafter; but if you find such

to have been the fact, you will render a verdict of not guilty
163 upon this entire indictment, because then there is or would be a variance in the proof. If you should find the fact to be as claimed by the defendant on this point, it is enough for me to say that for reasons touching the allegations of the indictment, as appearing in the light of the evidence in the case, you must render a verdict of not guilty upon this entire indictment.

I ought to explain what is meant in this connection by the authority of the president to bind the bank by certification. In the first place, I have no reference to the obligations of the bank to a third person who might innocently purchase or obtain a check certified by the president in ignorance of the by-laws or course of proceedings of the bank or of the actual authority which the president was by the practice of the bank or the votes of the directors empowered to use. Neither is it a question whether the checks, without the authentication of the paying teller, would be good delivery at the clearing-house. Probably, if this by-law was posted at the clearing-house, checks not authenticated would not be good delivery. I don't know about that, and neither you nor I need trouble ourselves about that. What I mean is this, to state it as accurately as I can: If the president of this bank, according to the vote of the directors and the course of business of the bank, was not authorized to certify these checks as between the bank and others knowing all the facts, without the authentication of the paying teller, so that as to persons who knew all the facts the certification would not bind the bank without the authentication of the paying teller, this indictment cannot be sustained, and you must find a verdict for the defendant. Now, upon that point the United States put in the vote of the directors "that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, provided the bank has any funds for the amount of said checks, when the same are presented." Here comes the clause which is so important in this case: "All such checks when certified to be countersigned by the paying teller." Now, gentlemen, if the case stood upon that vote alone, so that it was a pure question of law for the court to instruct you about, I should advise you that that vote was merely directory, and that the bank was bound by a certification, although the check got out without the authentication of the paying teller, and that the fact that the indictment does not allege with reference to the certification other than it does allege on this point, and the fact that the United States have not proved other than it has proved upon this point, would afford no defence to this case. I instruct you that *prima facie* upon this vote such is the state of the law with reference to this case. But this is a criminal case and I cannot take the facts from you, and you are entitled to bear in mind that any vote of the directors establishing a certain order of things upon this point or any other is controlled by the course of business at the bank, and must be practically construed in the light of the course of business at the bank, and if upon the proofs in this case altogether, taking this vote with the rest, you are not satisfied be-

yond a reasonable doubt that the president was authorized
164 to bind the bank by his certification, you must find a verdict for the defendant upon the whole indictment. You are to consider in this connection whether the act of the paying teller, either as required by this vote or as practised in the ordinary course of business at the bank, was anything more than for the purpose of enabling him to keep a record of the checks that were certified in order that he might know the state of the account of a customer of the bank or whether it was for the purpose of uniting with the president in binding the bank by a joint certification or by the joint act of him and the president. I can only say, gentlemen, that if you find in the practice of the bank something which, taken with this vote, leaves upon your mind a reasonable doubt upon this branch of the case, you must return a verdict for the defendant. In other words, the United States, taking this vote and what appears here concerning the course of business at the bank and other facts laid before you touching this matter, must prove this part of the case, in connection with others, beyond a reasonable doubt."

Second. The defendant excepted to that portion of the judge's charge relating to the making of deposits and their *prima facie* absorption when entered into a single account as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill. That portion of the judge's charge excepted to on this point is as follows:

"Then comes the allegation that the said persons"—that is, Irving A. Evans & Co.—"did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of $2,450 in money." Now, gentlemen, what I have to say to you touching that proposition comes down, I think, practically and substantially to one question. I ask you, first of all, gentlemen, to determine whether or not the overdrafts, so called, of Irving A. Evans & Co. on the morning of these days, the 23rd, 24th, and 25th days of July, and at the evening or close of the 23rd or 24th, appeared on the books of the bank in the account and in the same account in which the deposits and checks of Evans & Co. were usually credited and charged, and whether this account is the ordinary deposit account, such as was kept with other depositors or was kept upon the books of the bank, making no distinction for this purpose between individual depositors and banks, although there must have been some separation by carrying them upon separate books. Then, gentlemen, I ask you to determine whether or not the checks deposited by Evans & Co. on these days or the other deposits made by them went through the regular and usual course customary at that bank with checks deposited by customers, and whether they went or not finally upon this account in which appear the overdraft that I have spoken of: and I ask you further to determine whether or not this course of business at the bank was recognized by Evans & Co., and whether or not Evans & Co. permitted corresponding entries to be made upon their pass books

daily. If you find those facts in the affirmative, then the question under this statute is not what was agreed to be done, but what was done, and I say to you that *prima facie* the deposits
165 as they came in later were in fact applied towards the liquidation of the overdraft which appeared each day at the commencement of business, and were thus absorbed; and that as it is apparent and admitted that the entire amount of deposits was not equal to the overdraft with which the day commenced, you should consider that as a matter of fact there were no moneys on deposit at any portion of the 23d, 24th, or 25th of July against which checks could be certified. But, gentlemen, it is claimed upon the other side that notwithstanding the facts to which I have called your attention, certain deposits were set aside for the purpose of meeting or covering checks that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks were so treated by the bank as to become themselves a deposit in some form, would not sustain a defence in this case. I instruct you that the setting aside of a check temporarily, or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it, would not meet the purpose of this statute, unless it was made itself the basis or a part of a deposit; and I instruct you, gentlemen, that unless the defence can show or does show that as a matter of fact certain checks were set aside, not as a matter of agreement, not that there was an agreement to do so, but unless they show to you that as a matter of fact certain checks were set aside as a deposit, according to the ordinary course or the proper course of business, and appearing on the books and papers of the bank as against which checks might be certified, this proposition will not avail the defence."

Third. The defendant excepted to that portion of the judge's charge regarding the burden of proof being on the defence to show that a separation or segregation of certain deposits was made to certify against, the defendant's contention being that the burden of proof was upon the Government to establish beyond a reasonable doubt every point essential to the proof of the case.

That portion of the judge's charge excepted to on this point is as follows:

"But, upon some reflection, I have come to the conclusion that notwithstanding Evans & Co. may have been overdrawn on the morning of any particular day and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain checks or other moneys and hold them for the purpose of covering the certified checks, that it would not be any violation of the letter or policy of the statute and would be a defence; but I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable to see in the case any evidence—I do not mean to say evidence of what was intended or agreed to be done, which is not essential to this case, but any evidence that as a matter of fact any of these checks deposited by Evans & Co. did not go into the general deposit account and were not absorbed the instant they passed into the bank. Upon this

branch of the case I instruct you the burden of proof is on the defence; not proof beyond a reasonable doubt, but to satisfy you by a preponderance of evidence. If the defence does satisfy
166 you by a preponderance of evidence that there was a segregation in fact appearing upon or shown from the books and papers of the bank, a segregation, a setting apart of certain deposits sufficient to cover the certified checks and against which the checks were certified, it is a defence in this case."

The defendant further excepted to the following portion of the judge's charge as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

The portion excepted to is as follows:

"On the other hand, the position taken by the counsel for the United States is perfectly correct. This statute is a law for the regulation of banking business. Its provisions are arbitrary, but are to be obeyed; and yet they are of that character that while the United States must prove knowledge and wilfulness, it is not necessary that the United States should prove that the defendant was guilty of a corrupt purpose, guilty of moral turpitude, guilty of fraudulent intent, or guilty of an injurious purpose, except so far as the word injurious is a technical word and implied in every unlawful act by force of law; and a conviction of an offence under this statute does not imply that the defendant has been guilty of any of those things, although the maximum penalty is so large that there may be an opportunity for considering such things upon hearing the facts pertinent when sentence is pronounced, but here there are no considerations of that character whatever. The offence under this statute may be committed under such circumstances as need not imply any of these things. Certainly it is not for the United States to prove them, and the United States are perfectly right in saying they are not bound to prove any of these corrupt purposes."

The defendant excepted to the following portion of the judge's charge in view of the exclusion of evidence of belief heretofore recited, and as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill:

"And, gentlemen, I ought to add that while ignorance of the law is not an excuse, sometimes ignorance of fact based upon ignorance of the law is an excuse; and if in this particular case it is true, or should be found by you to be true, as claimed by the defence, that the defendant acted upon the belief that the law authorized him to certify checks against the morning deposits, and for that reason when the question of certifying checks was before him kept in mind only the morning deposits and was ignorant for that reason of the general condition of the accounts, that fact would have great weight, very great weight, upon the question of knowledge to which I call your attention."

With reference to the above exceptions to a portion of the judge's charge, and before the jury retired, and before the exceptions were noted, but after they were orally stated, the court inquired of the

counsel for the defence whether exception was intended to any particular expression or only to the substance, and the reply was that it was only to the substance.

167 The jury returned a verdict of guilty on the following counts: Nos. 1, 3, 7, 9, 11, 15, 17, 19, 23, 25, 27, 31, 33, 35, 39; and not guilty on the following counts: 2, 4, 5, 6, 8, 10, 12, 13, 14, 16, 18, 20, 21, 22, 24, 26, 28, 29, 30, 32, 34, 36, 37, 38, 40.

And the defendant prays that these his exceptions may be allowed.

ASA P. POTTER.

U. S. Circuit Court, Massachusetts District, October Term, A. D. 1892.

The foregoing exceptions are allowed and ordered to be entered of record.

WILLIAM L. PUTNAM,
U. S. Circuit Judge.

April 19, '93.

It is thereupon considered by the court, to wit, April 22, 1893, that the said Asa P. Potter pay a fine of one thousand dollars, and that he be punished by imprisonment in the jail at Cambridge, in this district, for the term of sixty days, and that he stand committed until sentence be performed.

A true record.

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

168 UNITED STATES OF AMERICA, }
District of Massachusetts. }

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled No. 1211, criminal docket, United States of America, by indictment, *v.* Asa P. Potter, in said circuit court determined, and that annexed hereto are true and attested copies of a petition for writ of error and assignment of errors filed in said court, the opinion of the court on demurrer, bond to prosecute writ of error, order for supersedeas, order for bail pending writ of error, recognizance taken under said order, and an original citation on writ of error, with acknowledgment of service thereon, all constituting true and attested copies of the record and proceedings in said cause, with all things concerning the same.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Seal of the Circuit Court, Massachusetts.

ALEX. H. TROWBRIDGE, *Clerk.*

169 Circuit Court of the United States, District of Massachusetts.

UNITED STATES
v.
ASA P. POTTER. } No. 1211. Criminal.

Petition for Writ of Error.

(Filed April 22, 1893.)

To the honorable justices of the Supreme Court of the United States or any judges of the circuit court of the United States for the said district:

And now comes the defendant, Asa P. Potter, and complains that in the records and proceedings and also in the rendition of judgment in a plea between the United States and the defendant, tried in the circuit court of the United States for said district at the October term, A. D. 1892, in which a judgment was rendered against him on the 22nd day of April, A. D. 1893, manifest error hath intervened, to the great damage of the said defendant.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

ASA P. POTTER.
W. S. B. HOPKINS,
Of Counsel.

A true copy.
Attest:
—— ——.

Assignment of Errors.

(Filed April 22, 1893.)

Afterwards, to wit, on the second Monday of October, in the year of our Lord eighteen hundred and ninety-three, at the October term for eighteen hundred and ninety-three of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Asa P. Potter, by W. S. B. Hopkins, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, to wit:

1. The circuit court has erred in overruling the demurrers to counts 1 to 40, both inclusive, and in sustaining the validity of said counts, in that said counts, and each of them, are not sufficient in law and do not set out any offence under the laws
170 of the United States, in that said counts, and each of them, set forth the certification of a check simply by a writing upon said check, and fail to set forth any completion of the contract of certification, and fail to set forth any delivery of said certification to any person whatever, and fail to set forth the creation of any contract of certification or liability whatever of the said association upon said check.

2. The circuit court has erred in overruling said demurrers and sustaining said counts 1 to 40, both inclusive, in that said counts,

and each of them, are fatally defective in that the allegation, "amount of money equal to the amount specified," contained in each count and forming a substantial averment thereof is argumentative.

3. The circuit court has erred in overruling said demurrers and sustaining counts 1, 2, 9, 10, 17, 18, 25, 26, 33, 34, in that said counts, and each of them, are defective in that they fail to allege that the money was not on deposit at the time the paying teller authenticated the check specified in each of said counts.

4. The circuit court has erred in admitting in evidence the certifications upon Exhibits A, B, C, D, and E, the checks the certifications of which are complained of in the indictment, to be read to the jury, inasmuch as there was a variance as a matter of law between the allegation in each count of the indictment that the defendant certified the said checks by writing, putting, and placing thereon the words and figures following:

Maverick National Bank.

Certified Jul- 23, 1891.

Pay only through the clearing-house.

A. P. POTTER, *P.*

——— ———, *Paying Teller.*

and the evidence that the checks in question were certified under the following vote of the bank:

"Voted, that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, providing the bank is in funds for amount of said checks when the same are presented; all such checks when certified to be countersigned by paying teller.

A. P. POTTER, *P.*

Attest: J. W. WORK, *C.*"

and the evidence that, according to the custon of the bank, the paying teller countersigned each certification, and each certification offered in evidence showing, as a matter of fact, the initials, A. C. J., of the paying teller upon the certification stamp opposite the words paying teller, written upon the same by the paying teller, A. C. Jordan, the defendant claiming that, as matter of law, under the vote of the directors and the custom of the bank, the initials of the paying teller, as his signature, in countersigning the certification was an integral and essential part of the certification, and which was not set forth at all as such in the 1st, 2nd, 3d, 4th, 7th,
171 and 8th counts of the indictment in each set of eight counts (there being eight counts devoted to each check), and which is set forth in the 5th and 6th counts of each set of eight counts only as being made by the accused, while the evidence showed that the countersigning was done by the paying teller, A. C. Jordan.

The defendant claimed a variance existed as to the counts which

rendered the proffered evidence inadmissible, and that the variance appears as matter of law.

5. The circuit court has erred in admitting in evidence the fact that on four different occasions—two in June, 1891, and two in July, 1891—another check drawn by Evans & Co. upon the Maverick National Bank of Boston and not referred to in the said indictment was certified.

"During the trial William S. Bliss, a partner of the firm of Irving A. Evans & Co., was allowed to testify to two conversations with the defendant occurring some time in the month of June, 1891, and two conversations with the defendant occurring some time in the month of July, 1891, the witness being unable to fix the date of these conversations more definitely, to the effect that he would see Mr. Potter and state that he had come over to get a check certified. Mr. Evans requested him to do so; and Mr. Potter would state that Mr. Evans had not kept his word, had not done right; had not reduced the overdraft or loan.

The witness was then asked, on four different occasions after the above conversations had been testified to, by the Government, 'Was the check then certified?' The defendant objected upon each of the four occasions on the ground that it was proving an immaterial and incompetent fact relating to the certification of another check at another time, immaterial to the only ground upon which this inquiry could be entered into—that is, the knowledge of the existence of the overdraft or overdraft loan.

The witness was allowed to answer upon each of the four occasions, the answer being yes, and the defendant excepted upon each occasion to the admission of this evidence."

6. The circuit court has erred in refusing to admit the evidence set forth in the following offer of proof made by defendant:

The counsel for the defence called Joseph W. Work, the cashier, and interrogated him as follows:

Q. What was that debit balance between Mr. Evans & Company and the bank?

To this question the Government objected.

The counsel for the defence thereupon stated that the inquiry related to "the nature of the account."

In this connection the counsel for the defence made the following offer: "My offer is to show by this and other witnesses that the apparent overdraft, debit balance, due from Irving A. Evans & Co., to the bank, arising out of the account current, on each of the mornings was treated by both parties, under an understanding between them, as a loan, on which daily interest was charged, the interest being figured upon the amount, which was ascertained after clearing—the amount of money, ascertained after clearing, that the bank was out during the day, what the bank was out of one day—as the sum which in justice interest should be paid upon; and that the indebtedness was ascertained at the end of each day by balancing the account at the end of each day; and that this arrangement was carried out by a deposit of collateral in the-

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hands or in the department of the assistant cashier, who was the usual certifying officer of the bank."

The COURT: "Have you in this connection any entries upon the books of the bank to put in?"

The counsel for the defence thereupon replied: "The entries of these balances, I believe, are in. The entries of interest are in—that is, if they are not in I should offer them."

The COURT: "They are in. Have you any other entries upon the books of the bank to go in, in connection with this subject-matter?"

Counsel for the defence thereupon replied: "I have not, your honor. I think, if your honor please, all these entries have been called to the attention of the jury, unless there may be entries upon the teller's book of interest that have not been testified to as interest. I understand that the interest was cast by Mr. Domett ordinarily, the assistant cashier, who had the run of the loan, and I understand that he—I speak a little hesitatingly because I am not quite sure, but I, think these entries went on the books of the teller; at any rate, they went on the books of Mr. Moore, and that is in."

The COURT: "Well, besides the entries of interest, have you any other entries in this connection?"

A. "I think not; I don't remember any other."

Counsel for the defence thereupon stated as follows: "Now, if your honor please, the first proposition that I have to make is this: * * * In the first place, a loan may be created by an arranged overdraft. Our second proposition is that if a loan is created by an arranged overdraft it may be carried legitimately as a loan."

The COURT: "Let me ask you before your remarks whether you propose to show that what you call a loan was for any specific amount?"

Counsel for the defence: "Only at this period of time we are discussing there was what you may call a general limit of about $200,000—that is, not to exceed it.

The figures that have been put in run from $120,000, I think, in June up to $200,000 on one of these three days, but no actual, absolute limit, but a limit of about $200,000, which you may call a limit."

Upon the objection of the Government the court ruled out this question and this offer of evidence, and the defendant excepted.

7. The circuit court has erred in admitting in evidence the certification by the defendant of six checks drawn by Irving A. Evans & Co. upon the Maverick National bank, dated July 23d and 24th, 1891, respectively, and certified on July 23d and 24th, 1891, respectively, said checks being for varying amounts, and both checks and the certifications thereof being substantially in the same form as checks Exhibits A, B, C, D, and E, with the certifications thereof as set out in the bill of exceptions, which is hereby made part hereof for the purposes of describing said checks.

The admission of these certifications was objected to on the ground that it was an attempt to prove other acts which might or might not be in connection with the accounts of the same day, which might or might not be criminal in their character, and on the

ground that they were irrelevant to the proposition touch-
173 ing knowledge and intent in the certification of checks included in this indictment, and that they could only be admissible as proof of the transactions which would require the same proof under the statute, that the facts existed which would make the certification of each individual check a criminal offence, as apply to the certifications of the checks set forth in the indictment.

8. The circuit court erred in refusing to admit the evidence set forth in the following offer of proof made by the defendant:

The defence called the defendant, Mr. Potter, and offered to prove by him an oral agreement between I. A. Evans & Co. and the Maverick National bank in the early part of 1891—before June or July, 1891—that Evans & Co. might have a loan by overdraft limited to $200,000, with interest to be charged daily at the rate of six per cent., against which collateral was to be put up, and further to show that the overdrafts existing in June and July, 1891, were under this agreement, and that collateral was actually deposited and kept against it in the hands of the assistant cashier; that this agreement was communicated to the executive officers of the bank and to a majority of the directors of the bank, who approved it, and this offer was made in connection with the facts that appear in evidence in relation to the books of the bank; also the defence offered another conversation between Mr. Potter and Mr. Evans in relation to the matter of certification of checks and deposits connected with this certification, in which Mr. Evans called his attention to the fact that a check had been refused certification, and Mr. Potter told Mr. Evans that it was, undoubtedly, because he had no deposit there; whereupon Mr. Evans said, "But I have a loan, as I understand it;" to which Mr. Potter replied substantially, "We cannot certify checks against a loan; if you are going to have certified checks, you must have deposits in the bank to certify them against;" and that from that time forward the deposits were in, to Mr. Potter's knowledge, from day to day, after this conversation with Mr. Evans, in which the defence claims that the parties to the conversation understood distinctly that the daily deposits were to be in for the very purpose of certifying checks.

This whole offer was offered by the defence as material matter of substantive defence, as a part of the *res gestæ* and of the transaction, and as specifically bearing upon the question of criminal intent upon the part of the defendant. The facts "that appear in evidence in relation to the books of the bank," as referred to in the above offer and in connection with which the offer is made, are heretofore fully stated in this bill of exceptions.

The defence then put the following questions to the witness, the defendant, for the purpose of proving the facts set forth in the above offer of evidence:

Q. Did you have any conversation with Irving A. Evans prior to June or July, 1891, as to overchecks?

A. The witness answered yes; and was then asked:

Q. Give that conversation.

Objected to by the Government and excluded, and exception taken by the defence.

9. The circuit court erred in excluding the following evidence, the same being based upon the offer of proof set forth in
174 the preceding assignment of error, which is hereby made part hereof:

The defence asked Mr. Potter: "Now, I ask this question as bearing upon the same conversation: Was such a conversation communicated to the cashier and to a majority of the directors of the bank?" This was objected to by the Government, excluded by the court, and exception taken by the defense.

10. The circuit court erred in excluding the following evidence, the same being based upon the offer of proof set forth in the 8th assignment of error herein, which is made part hereof.

The defence asked Mr. Potter: "What do you know in regard to the depositing of money by Irving A. Evans & Co. in the Maverick bank from day to day?"

The GOVERNMENT: "Wait a moment."

The COURT: "It is excluded."

The DEFENCE: "Note my exception."

The COURT: "One moment. Does that question bear upon the same subject-matter you have been talking about?"

The DEFENCE: "Yes, your honor; that is to say, the conversation in regard to the necessity of having deposits, that I opened in my offer."

The COURT: "Then I exclude it."

The defence excepted.

11. The circuit court erred in excluding the following evidence, being based upon the offer of proof set forth in the 8th assignment of errors herein, which is made part hereof:

The defence asked Mr. Potter the following question: "I will ask another question: Whether or not you know there were deposits of money by Irving A. Evans & Co. in the Maverick bank made from day to day?"

The GOVERNMENT: "I object to that."

The DEFENCE: "In the same connection."

The COURT: "If it is in the same connection, I exclude it. If it is not in the same connection, I admit it."

The DEFENCE: "The books would show it. I offer it in connection with what I have already said, because the books show the facts."

The COURT: "I exclude it."

And the defence excepted.

12. The circuit court erred in excluding the following evidence:

The defence asked Mr. Potter, after he had been permitted to testify that he knew there was a deposit of Evans & Co. to meet it at the time of the certification of Exhibit A, the check for $2,450, on which the first eight counts of the indictment are based:

Q. What was your belief in regard to your right to certify a check as against that deposit?

This question was excluded by the court, and exception taken by the defence.

13. The circuit court erred in excluding the following evidence:

After Mr. Potter had been allowed to testify that he knew there was a deposit of Evans & Co. to meet them at the time of the certification of each of the Exhibits B, C, D, and E, which are the remaining checks covered by the indictment, counts 9 to 16 being devoted to Exhibit B, counts 17 to 24 being devoted to Exhibit
175 C, counts 25 to 32 being devoted to Exhibit D, and counts 33 to 40 being devoted to Exhibit E, the defence asked him the following question:

Q. Whether in each of these certifications it was your belief that you had a right to certify against that deposit?

This question was excluded by the court, and exception taken by the defence.

14. The circuit court erred in excluding the following evidence:

After the defendant had testified that there were deposits from day to day during the month of June and July, the defence asked the defendant, "What was your belief as to your right to certify checks as against daily deposits with the knowledge of the debit balance that stood in Evans & Co.'s account and the condition of his account on the books of the bank?

Objected to by the Government, excluded by the court, and the defendant excepted.

15. The circuit court erred in excluding the following evidence:

The defence asked the defendant:

Q. Was there ever, prior to July 21, 1891, any talk between you and Mr. Evans as to his deposits and certification as they related to each other? Give the conversation.

Objected to by the Government, excluded by the court, and exception taken by the defendant.

This question was asked in connection with the offer previously made by the defendant and given in full in assignment number 8 and made part hereof.

16. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as to each and all of the counts of said indictment there is a variance between the allegation in each count that then and there, at the very moment of certification, the check was "of the following tenor," a copy of the check being given without any certification thereon and the check produced in evidence which shows an alleged certification thereon.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

17. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That the words "then and there," in said indictment and each count thereof, are either used distributively, as meaning and relating two different periods of time, and that said indictment and each count thereof sets forth no offence against the laws of the United States, and that the same be quashed, or that the said indictment

and each count thereof sets forth the check set forth therein as both certified and uncertified at the same moment of time, as co-existent with each other, and each count is bad for repugnancy.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

18. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to the creation of a valid certification by the Maverick National Bank of Boston, the vote of said bank required, as an integral part of said certification, countersigning by the paying teller, and that the alleged certifications,
176 as set forth in the indictment and each count thereof, do not set forth any countersigning by the paying teller, and that as a matter of law neither the indictment nor any count thereof sets forth a valid certification by the president of the bank.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

19. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party with notice of the same, the vote of said bank required as an integral part of said certification the countersigning by the teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamped words "—— ——, paying teller;" that the said words, "—— ——, paying teller," stamped upon each check, would affect any holder of said check with notice of said vote and requirement; that there is a variance between the allegation in each count that the certification was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote that such countersigning was a prerequisite of valid certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

20. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to the creation of a valid certification by the Maverick National Bank of Boston, the vote and custom of the bank required as an integral part of said certification the countersigning of the paying teller, and that the alleged certification, as set forth in the indictment and each count thereof, did not set forth any countersigning by the paying teller; that as a matter of law neither the indictment nor any count thereof sets forth a valid certification by the president of the bank.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

21. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party with notice of the same, the vote and custom of said bank required as an integral part of said certification the countersigning by the paying teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamped the words "—— ——, paying teller;" that the said words, "—— ——, paying teller," stamped upon each check, would affect any holder of said check with notice of said vote and custom of the bank and requirement; that there is a variance between the allegation in each count that the certification
177 was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote and custom of the bank that such countersigning was a prerequisite of valid certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

22. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That neither of the counts of the indictment sets forth any offence against the laws of the United States, in that each count simply alleges a certification by writing, putting, and placing certain words upon a check and fails to allege delivery of the certification by the bank or the communication of that writing in any way, shape, or manner to any person, and that such delivery or communication is an essential element of the act of certification, and the failure to allege the same renders each count so far defective that it sets forth no offence against the laws of the United States.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

23. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that an overdraft is to be treated between the parties as a loan and interest is charged upon the same, and the deposit is then made in the bank by the depositor to his account and the said deposit is entered to the credit of the depositor upon the books of the bank, the officers of said bank may lawfully certify checks drawn by the depositor, not exceeding in amount the amount of such deposit, prior to the withdrawal of said deposit by the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

24. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement was made between a bank and its depositor that an overdraft is to be treated between the parties as a loan and interest is charged upon the same, and the account of the depositor is balanced at the end of each day, which balance shows the state of the account at the morning of the next day, and a deposit

is then made on such day by said depositor to his account, and the said deposit is entered to the credit of the depositor upon the books of the bank, the officers of the said bank may lawfully certify upon such day checks drawn by the depositor not exceeding in amount the amount of such deposit prior to the withdrawal of said deposit by the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

25. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and he shall pay interest thereon, and the depositor in pursuance of the agreement overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor.

178 The court refused to so instruct the jury, and the defendant excepted to such refusal.

26. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor, and if the depositor's account is balanced at the end of the day, which balance shows the amount of the overdraft loan at the beginning of the next day, and if during such day a deposit is made by the depositor in the bank to the credit of his account, entered upon the books of the bank to the credit of the depositor, until the same has been withdrawn by drafts against it such deposit may be lawfully applied by the bank to the certification of the depositor's checks.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

27. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where a deposit is made by a dealer whose account is overdrawn by agreement with the bank that he may overdraw not exceeding a limit of $200,000, and that interest may be charged upon such overdraft, and after such deposit is made and entered to the credit of the dealer, and before the same has been drawn out by the dealer, a request from such dealer to certify checks to an amount equal to or less than the amount of such deposit, and the certification of the same is an application both by the dealer and by the bank of the deposit to the check certified.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

28. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where a dealer's account is overdrawn by agreement with the bank that he may overdraw not exceeding a limit of $200,000, and that interest may be charged upon such overdraft, and the dealer's account is balanced at the end of the day, which balance constitutes the balance at the beginning of the next day, and during such day a deposit is made by the dealer and entered to the credit of the dealer, and after such deposit is made and entered, and before the same has been drawn out by the dealer, a request from such dealer to certify checks to an amount equal to or less than the amount of such deposit, and the certification of the same is an application both by the dealer and by the bank of the deposit to the checks certified.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

29. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account, and in-

179 terest is charged thereon, the transaction constitutes a loan by the bank to the depositor, and a deposit then made to the account of the dealer, which is entered up to the credit of the dealer upon the books of the bank, and against which deposit and with reference to which deposit a check or checks for an amount equal to or less than the amount of such deposit are certified by the president of the bank, all being done in the regular course of business, the assumed facts exclude any criminal intent on the part of the president.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

30. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The above facts assumed in the last request exclude any violation of the statute by the president in making such certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

31. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That the entry by a depositor, made upon a deposit slip which is handed to the bank by the dealer with an accompanying deposit and received and held by the bank as such, and is preserved among the papers of the bank and which is used in the bank to make other entries on the books of the bank, becomes by delivery to the bank an entry upon the books of the bank to the credit of the dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

32. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That the entry of deposit upon a prepared block or memorandum paper, called in this evidence schedule of balances, kept by the bank in the department of the cashier to the credit of the dealer, in the regular course of business, is an entry regularly made upon the books of the bank to the credit of the dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

33. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a bank has allowed a dealer to overdraw his account by express agreement between the bank and the dealer that the said dealer may overdraw his account at any time, until notified to the contrary, to an amount not exceeding $200,000, that the transaction shall constitute a loan, and that interest shall be paid upon the same, and the account is balanced at the end of the day, which balance is the balance at the beginning of the next day, and when deposits are subsequently made on said last-named day by the said dealer and entered to his credit upon the books of the bank, and the president of the bank certifies the checks of the dealer upon said last-named day to an amount not exceeding the deposits so made on that day, honestly believing that he has a legal right to do the same, that the above facts exclude any criminal intent upon the part of the president in making the said certification.

180 The court refused to so instruct the jury, and the defendant excepted to such refusal.

34. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last request, any wilful violation of the statute by the president in making such certification is excluded.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

35. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when deposits are made in a bank by a dealer and the same are regularly entered to the credit of a dealer upon the books of the bank, and the president of the bank, honestly believing he has a legal right so to do, certifies checks of the dealer to an amount not exceeding the deposits of the dealer on said day, before the said dealer has otherwise specially withdrawn the said deposits, then the above facts exclude any criminal intent upon the part of the president in making such certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

36. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last request, any wilful violation of the statute by the president in making such certification is excluded.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

37. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when in the regular course of business it is the duty and practice of a particular clerk of the bank, such clerk being a suitable and proper person and properly qualified for the performance of his duties, when a check of a dealer is presented for certification to the bank, to examine the account of the dealer to see whether the dealer has on deposit, entered to his credit upon the books of the bank, such an amount as will legally authorize the officers of the bank to certify such check, and when it is the duty of the clerk in the regular course of business, after such examination of the dealer's account and after having satisfied himself of the existence of such facts, to present the check for certification, first, to the assistant cashier, if he be present in the bank; second, to the cashier, if the assistant cashier is absent, and, third, to the president, if both of the cashiers are absent, and the president thereupon, relying that the clerk has done his duty, certifies the said check when brought to him by the clerk, said president not personally knowing what deposits have been made that day by the dealer and regularly entered to the credit of the dealer upon the books of the bank other than by the due course of business, that the above facts exclude any criminal intent upon the part of the president in making such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

181 38. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last request as true, they exclude any wilful violation of the statute on the part of the president in making such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

39. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a debit balance appears on the dealer's account on the books of the bank at the beginning of a day, and during the day deposits are entered to the credit of the dealer upon the books of the bank, and during the day and prior to any balancing of the dealer's account and prior to any withdrawal of the same by the dealer, checks are certified by the president of a bank, in reliance upon such deposits, to an amount not exceeding the amount of such deposits, which checks when certified are charged against the dealer's account, the certification of such check is an application by the bank of the deposit to such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

40. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a debit balance appears on the dealer's account on

the books of the bank at the beginning of a day and during the day deposits are made by the dealer and the same are not withdrawn by the dealer, and prior to any balancing of the dealer's account for that day, the dealer has on deposit with the association an amount of money equal to the amount of said deposits, and the officers of the bank are legally authorized to certify checks drawn by the said dealer to an amount equal to the amount of such deposits.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

41. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when an agreement exists between the bank and dealer that an overdraft shall be a loan, and that the dealer may overdraw his account up to a certain limit, and interest shall be charged upon the same, and in pursuance of such an agreement the dealer overdraws his account not exceeding the said limit, and while such overdraft exists, pursuant to such agreement, deposits are made by the dealer and are not withdrawn by the dealer, the dealer has on deposit with the association an amount of money equal to the amount of the said deposits, and the officers of the bank are legally authorized to certify checks drawn by the said dealer to an amount not exceeding the amount of such deposits.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

42. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when an agreement exists between the bank and a dealer that an overdraft shall be a loan, and that the dealer may
182 overdraw his account up to a certain limit, and interest shall be charged upon the same, and in pursuance of such an agreement the dealer overdraws his account and his account is balanced to determine the amount of overdraft at the end of each day's business, and while such overdraft exists, pursuant to such agreement, deposits are made during the day by the dealer, and before the same are withdrawn by the dealer the president of the bank, believing that the dealer has on deposit with the said association the amount of such deposits, and that he is lawfully authorized to certify the checks of the dealer to an amount not exceeding the amount of such deposits, does certify the checks of the dealer to an amount not exceeding the amount of such deposits, the above facts negative any criminal intent upon the part of the president in certifying the said checks of said dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

43. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last paragraph, they negative any wilful violation of the statute by the president.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

44. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a debit balance appears on the dealer's account on the books of the bank at the beginning of the day, upon which interest is charged, and the account is not balanced until the end of the day upon the books of the bank, and during the day deposits are made by the dealer, and the president honestly believes that the depositor has on deposit with said association the amount of such deposit, and that he has a lawful right to certify checks of the dealer to an amount not exceeding the amount of such deposit and does so certify such checks, the above facts negative any criminal intent upon the part of the president in such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

45. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last paragraph, they negative any wilful violation of the statute by the president in such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

46. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether the facts exist which shall lawfully authorize the certification of a check before bringing the check to an officer of the bank to certify, and such check is so brought to the officer by the clerk for certification, the certifying officer has a right to rely that the clerk has done his duty in the premises, and to certify the said check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

183 47. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The existence of the facts stated in the last request negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

48. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The existence of the facts stated in the last request negatives any wilful violation of the statute by the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

49. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether all the facts exist which shall lawfully authorize the certification of a check before bringing the check to

an officer of the bank to certify, and the certifying officer knows that the account of the dealer has been overdrawn by agreement, that such overdraft be a loan, and knows that deposits have been made by the dealer on the day in question, but is ignorant whether the amount of the deposits exceed the amount of the overdraft and the check at the particular moment the check is brought to him, the certifying officer has a right to rely that the clerk has done his duty in the premises, and to certify the said check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

50. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

51. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any wilful violation of the statute by the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

52. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether all the facts exist which shall legally authorize the certification of a check before bringing the check to an officer of the bank to certify, and the certifying officer knows that in June and sometimes in July an overdraft has existed in the amount of the dealer, and knows that deposits have been made by the dealer, but is ignorant whether the deposits on July 23, 24, and 25, at the moment any check is brought to him, exceed the
184 amount of the overdraft and the check, he has a right to rely that the clerk has done his duty, and to certify the check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

53. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

54. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any wilful violation of the statute upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

55. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That if the defendant believed he had right to certify against deposits of the day when an agreed overdraft existed, this belief negatived any criminal intent.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

56. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negatived wilful violation of the statute.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

57. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The word "wilfully" in this indictment means not simply that the defendant certified the checks in question "voluntarily," but that he did it with a bad purpose or with an evil intent, and in this case must be construed to imply an intended design to certify the checks in question or some one of them when he had no lawful right so to do.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

58. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The question whether the bank made an application of the daily deposits to the debit balances or otherwise is a question of fact for the jury.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

59. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The law will not apply payments according to the presumed interest of the parties, except where an application has been made—

1st. By the debtor;

2nd. By the creditor; or,

3d. By agreement between the debtor and the creditor.

185 The court refused to so instruct the jury, and the defendant excepted to such refusal.

60. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

It is lawful for a bank to permit a withdrawal of deposits made by a depositor who owes the bank a demand and overdue debt.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

61. The circuit court erred in charging the jury as follows:

After the judge's charge was given, and before the jury retired, the defendant excepted to that portion of the judge's charge regarding the countersigning by the paying teller as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

That portion of the judge's charge excepted to on that point is as follows:

The point is taken by the defendant that Mr. Potter had not power alone to certify checks; that in order to certify checks to bind the bank the signature of the paying teller was also necessary, or his initials. I will define that hereafter; but if you find such to have been the fact you will render a verdict of not guilty upon this entire indictment, because then there is or would be a variance in the proof. If you should find the facts to be as claimed by the defendant on this point, it is enough for me to say that for reasons touching the allegations of the indictment, as appearing in the light of the evidence in the case, you must render a verdict of not guilty upon this entire indictment.

I ought to explain what is meant in this connection by the authority of the president to bind the bank by certification. In the first place, I have no reference to the obligations of the bank to a third person, who might innocently purchase or obtain a check certified by the president in ignorance of the by-laws or course of proceedings of the bank or of the actual authority which the president was by the practice of the bank or the votes of the directors empowered to use; neither is it a question whether checks without the authentication of the paying teller would be good delivery at the clearing-house. Probably, if this by-law was posted at the clearing-house, checks not authenticated would not be good delivery. I don't know about that, and neither you nor I need trouble ourselves about that. What I mean is this, to state it as accurately as I can: If the president of this bank, according to the vote of the directors and the course of business of the bank, was not authorized to certify these checks, as between the bank and others knowing all the facts, without the authentication of the paying teller, so that as to persons who knew all the facts the certification would not bind the bank without the authentication of the paying teller, this indictment cannot be sustained, and you must find a verdict for the defendant. Now, upon that point, the United States put in the vote of the directors, "that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, provided the bank had any funds for the amount of said checks when the same are presented." Here comes the clause which is so important in this case: "All such checks when certified to be counter-
186 signed by the paying teller." Now, gentlemen, if the case stood upon that vote alone, so that it was a pure question of law for the court to instruct you about, I should advise you that that vote was merely directory, and that the bank was bound by a certification, although the check got out without the authentication of the paying teller, and that the fact that the indictment does not allege with reference to the certification other than it does allege on this point, and the fact that the United States have not proved other than it has proved upon this point, would afford no defence to this case. I instruct you that *prima facie* upon this vote such is the state of the law with reference to this case. But this is a criminal case, and I cannot take the facts from you, and you are entitled to

bear in mind that any vote of the directors establishing a certain order of things upon this point or any other is controlled by the course of business at the bank, and must be practically construed in the light of the course of business at the bank; and if upon the proofs in this case altogether, taking this vote with the rest, you are not satisfied beyond a reasonable doubt that the president was authorized to bind the bank by his certification, you must find a verdict for the defendant upon the whole indictment. You are to consider in this connection whether the act of the paying teller, either as required by this vote or as practiced in the ordinary course of business at the bank, was anything more than for the purpose of enabling him to keep a record of the checks that were certified in order that he might know the state of the accounts of customers of the bank, or whether it was for the purpose of uniting with the president in binding the bank by a joint certification, or by the joint act of him and the president. I can only say, gentlemen, that if unless you find in the practice of the bank something which, taken with this vote, leaves upon your mind a reasonable doubt upon this branch of the case, you must return a verdict for the defendant. In other words, the United States, taking this vote and what appears here concerning the course of business at the bank, and other facts laid before you touching this matter, must prove this part of the case, in connection with others, beyond a reasonable doubt.

62. The circuit court erred in charging the jury as follows:

After the judge's charge was given, and before the jury retired, the defendant excepted to that portion of the judge's charge relating to the making of deposits and their *prima facie* absorption when entered into a single account as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill. That portion of the judge's charge excepted to on this point is as follows:

"Then comes the allegation that the said persons—that is, Irving A. Evans & Co.—" did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of $2,450 in money." Now, gentlemen, what I have to say to you touching that proposition comes down, I think, practically and substantially to one question. I ask you, first of all, gentlemen, to determine whether or not the overdrafts, so called, of Irving A. Evans & Co. on the morning of these days, the 23rd, 24th,
187 and 25th days of July, and at the evening or close of the 23d or 24th, appeared on the books of the bank in the account, and in the same account in which the deposits and checks of Evans & Co. were usully credited and charged, and whether this account is the ordinary deposit account such as was kept with other depositors upon the books of the bank, making no distinction for this purpose between individual depositors and banks, although there must have been some separation, by carrying them upon separate books. Then, gentlemen, I ask you to determine whether

or not the checks deposited by Evans & Co. on these days, or the other deposits made by them, went through the regular and usual course customary at that bank with checks deposited by customers, and whether they went or not finally upon this account in which appear the overdrafts that I have spoken of, and I ask you further to determine whether or not this course of business at the bank was recognized by Evans & Co., and whether or not Evans & Co. permitted corresponding entries to be made upon their pass books daily. If you find those in the affirmative, then I say to you that the question under this statute is not what was agreed to be done, but what was done; and I say to you *prima facie* the deposits as they came in were in fact applied towards the liquidation of the overdraft which appeared each day at the commencement of business, and were thus absorbed; and that, as it is apparent and admitted that the entire amount of deposits was not equal to the overdraft with which the day commenced, you should consider that as a matter of fact there were no moneys on deposit at any portion of the 23d, 24th, or 25th of July against which checks could be certified. But, gentlemen, it is claimed upon the other side, notwithstanding the facts to which I have called your attention certain deposits were set aside for the purpose of meeting or covering checks that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks were so treated by the bank as to become themselves a deposit in some form, would not sustain a defence in this case. I instruct you that the setting aside of a check temporarily, or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it, would not meet the purpose of this statute unless it was made itself the basis or a part of a deposit; and I instruct you, gentlemen, that unless the defence can show or does show that as a matter of fact certain checks were set aside—not a matter of agreement, not that there was an agreement to do so—but unless they show to you that as a matter of fact certain checks were set aside as a deposit, according to the proper course of business, and appearing on the books and papers of the bank, as against which checks might be certified, this proposition will not avail the defence."

63. The circuit court erred in charging the jury as follows:

The defendant excepted to that portion of the judge's charge regarding the burden of proof being on the defence to show that a separation or segregation of certain deposits was made to certify against, the defendant's contention being that the burden of proof was upon the Government to establish beyond a reasonable doubt every point essential to the proof of the case.

That portion of the judge's charge excepted to on this point is as follows:

188 "But, upon some reflection, I have come to the conclusion that notwithstanding Evans & Co. may have been overdrawn on the morning of any particular day and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain checks or other moneys and hold them for the purpose of covering the certified checks, that it would not be any

violation of the letter or policy of the statute and would be a defence. But I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable to see in the case any evidence—I do not mean to say evidence of what was intended or agreed to be done, which is not essential to this case, but any evidence that as a matter of fact any of these checks deposited by Evans & Co. did not go into the general deposit account and were not absorbed the instant they passed into the bank. Upon this branch of the case I instruct you the burden of proof is on the defence — not proof beyond a reasonable doubt, but to satisfy you by a preponderance of evidence. If the defence does satisfy you by the preponderance of evidence that there was a segregation in fact appearing upon or shown from the books and papers of the bank—a segregation, a setting apart of certain deposits sufficient to recover the certified checks and against which the checks were certified—it is a defence in this case."

64. The circuit court erred in charging the jury as follows: After the judge's charge was given, and before the jury retired, the defendant excepted to the following portion of the judge's charge as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

The portion excepted to is as follows: "On the other hand, the position taken by counsel for the United States is perfectly correct. This statute is a law for the regulation of banking business; its provisions are arbitrary, but are to be obeyed; and yet they are of that character that while the United States must prove knowledge and wilfulness, it is not necessary that the United States should prove that the defendant was guilty of a corrupt purpose, guilty of moral turpitude, guilty of fraudulent intent, or guilty of an injurious purpose, except so far as the word injurious is a technical word and implied in every unlawful act by force of law. A conviction of an offence under this statute does not imply that the defendant has been guilty of any of those things, although the penalty is so large that there may be no opportunity for considering such things upon hearing the facts pertinent when sentence is pronounced; but here there are no considerations of that character whatever. The offence under this statute may be committed under such circumstances as need not imply any of these things. Certainly it is not for the United States to prove them, and the United States are perfectly right in saying that they are not bound to prove any of these corrupt purposes."

65. The circuit court erred in charging the jury as follows: After the judge's charge was given, and before the jury retired, the defendant excepted to the following portion of the judge's charge in view of the exclusion of evidence of belief heretofore recited and as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

189 That portion of the judge's charge excepted to on this point is as follows:

"And, gentlemen, I ought to add that while ignorance of the law is not an excuse, sometimes ignorance of fact based upon ignorance of the law is an excuse; and if in this particular case it is true, or should be found by you to be true, as claimed by the defence, that the defendant acted upon the belief that the law authorized him to certify checks against the morning deposits, and for that reason, when the question of certifying checks was before him, kept in mind only the morning deposits and was ignorant, for that reason, of the general condition of the accounts, that fact would have great weight—very great weight—upon the question of knowledge to which I call your attention."

66. The circuit court has erred in its judgment entered April 22, 1893, in said cause in sentencing the defendant, as neither the record nor the verdict of guilty severally rendered upon each of the following counts, 1, 3, 7, 9, 11, 15, 17, 19, 23, 25, 27, 31, 33, 35, 39, warranted or authorized the infliction of any sentence thereunder or constituted a valid conviction under the laws of the United States.

The record and bill of exceptions show that counts 1, 3, and 7 were based upon and severally charged the unlawful certification of a single check, numbered 54493, dated Boston, July 23, 1891, drawn by Irving a Evans & Co. upon the Maverick National Bank, payable to the order of Hayward & Townsend, for the sum of $2,450.

As to these three counts the record and bill of exceptions show that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that the counts 9, 11, and 15 were based upon and severally charged the unlawful certification of a single check, numbered 54498, dated Boston, July 24, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank, payable to the order of the National Security Bank, for the sum of $25,000.

As to these three counts, the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three of them and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that counts 17, 19, and 23 were based upon and severally charged the unlawful certification of a single check, numbered 54499, dated Boston, July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank, payable to the order of George C. Brooks & Co., for the sum of $275.

As to these three counts the record and bill of exceptions shows

that the defendant has been found guilty three different and
190 distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that counts 25, 27, 31 were based upon and severally charged the unlawfull certification of a single check, numbered 54518, dated July 25 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank of Boston, payable to the order of the National Security bank, for the sum of $25,000.

As to these three counts the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that counts 33, 35, and 39 were based upon and severally charged the unlawful certification of a single check, numbered 54519, dated Boston, July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National bank, payable to the order of National Security bank, for the sum of $7,500.

As to these three counts the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

ASA P. POTTER.

W. S. B. HOPKINS, *Of Counsel.*

A true copy.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

191 Circuit Court of the United States, District of Massachusetts.

UNITED STATES
v.
ASA P. POTTER. } No. 1211.

UNITED STATES
v.
THOMAS DANA. } No. 1213.

UNITED STATES
v.
JONAS H. FRENCH. } No. 1214.

Opinion of the Court.

(Filed Oct. 29, 1892.)

PUTNAM, *J.:*

The sixth amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. This is a reaffirmation of the essential principles of the common law, but puts it beyond the power of either Congress or the courts to abrogate them. It follows, as a matter of course, that the effect of this provision commences with the statutes fixing or declaring offences, and as to them insures the general rule of the common law that they are not to be construed to embrace offences which are not within their intention and terms. This does not mean that all the elements of a crime must be set out in the statute on which the prosecutor relies, nor that the statute may not create offence by the use of inapt or imperfect phraseology—United States *v.* Carll, 105 U. S. 611; but they must be in some way declared by the legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state.

192 The general rule is applied to an indictment more strictly. It is not sufficient that the pleader state merely the facts from which an offence can be implied, or only so many of the essential elements as in the ordinary experiences of life, or even in a statute, might suggest all the other elements, but he must state in terms everything necessary to constitute a criminal act. For example, as is well known, there are no common-law offences against the Federal authority; so that theft on shipboard, on the open seas, would not be punishable without a statute providing for it. It would be sufficient that such a statute set out in terms that larceny on shipboard, on the high seas, should be punishable with a certain penalty named; but every legal mind would at once admit that. Although this would be sufficient in the statute, an indictment which alleged merely that the person accused committed larceny on board a certain ship, naming it, on the high seas, embracing the entire phraseology of the statute, but without details of the property stolen and of its ownership and the other usual details, would be wholly insufficient.

So also there are certain offences, especially those arising under the revenue laws, which are punishable independently of the intent; but generally there can be no crime unless there is a criminal purpose. Congress, however, in declaring offences does not always note this distinction in the terms of the statute. It sometimes prohibits the act and declares the penalty in quite the same terms, whether as a part of the revenue laws, where the intent is not always important, or as part of the general criminal code, where it is essential; but in the latter case the courts understand that the
193 guilty purpose is an element which must be set out in the indictment, although not necessarily in the statute.

United States *v.* Carll, *ubi supra.*

Sometimes a statute, either through embracing a great many offences of the same class or for some other reason, is so general in its terms that the indictment must allege many particulars which the statute omits.

U. S. *v.* Cruikshank, 92 U. S., 542, 557.

These are a few illustrations out of many which might be made. They are sufficient to establish the proposition that while it is ordinarily enough that an indictment declares an offence in the language of the statute, as has many times been said by all the courts, this is not universally true, and does not excuse the prosecutor from setting out every essential element constituting the offence.

In order to properly inform the accused of the "nature and cause of the accusation" within the meaning of the Constitution and of the rules of the common law, a little thought will make it plain, not only to the legal but to all other educated minds, that not only must all the elements of the offence be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand not only the nature of the offence, but the particular act or acts touching which he must
194 be prepared with his proof; and when his liberty and perhaps his life are at stake, he is not to be left so scantily informed as to cause him to rest his defence upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offence.

These rules are well expressed in U. S. *v.* Cruikshank, 92 U. S., 542, 557, as follows:

"In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. *v.* Mills, 7 Pet., 142, this was construed to mean that the indictment must set forth the offence 'with clearness and all necessary certainty to

apprise the accused of the crime which he stands charged;' and in United States *v.* Cook, 17 Wall., 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, including generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species; it must descend to particulars. Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence and avail himself of his conviction or acquittal for protection against a
195 further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had; for this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

Other and later cases might be cited to the same effect.

In addition to these fundamental principles, the force of which all admit, there have been certain precedents, including precose forms of expression, some of them highly technical, in use for so long a period, not only with reference to offences long familiar to the law, but also with reference to new offences to which they can be applied, that they have come to have more or less the force of law. Some of them are undoubtedly the relics of what was once essential, but now unessential. Others, perhaps, were the mere fashion of the times, repeated so often that they are now in the mouth of every pleader. Some of them to the well-trained legal mind seem to be wholly unessential, the omission of which ought not prejudice any; yet, in view of the fact that ours is a Government of laws and not of men, and of the further fact that when the judiciary and the courts pull away from well-known landmarks they are apt to enter a field where their only guides are the varying individual and sometimes crude opinions of different judges, or mere judicial discretion, liable to run into a kind of oppression and injustice most detestable because most insidious. The courts ordinarily adhere to these forms, precedents, and expressions until common consent is united against them or the legislature has expressly interferred.

196 Revised Statutes, sec. 1025, provides that no indictment shall be deemed insufficient "by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant." But the statute does not aid much, because the question still remains, What are "matters of form?" The decisions touching it have been meagre.

With reference to all the principles I have stated, there seems to be no distinction concerning either the rules applicable to the construction of the statutes, or the requisites of indictments on account of the severity of the punishment inflicted, except in behalf of

capital offences or those involving the liability of imprisonment for life and possibly in behalf of felonies at common law. The discussions at the bar urging the contrary were interesting and presented some lines of reasoning not easily answered; but they are all met, at least so far as these cases and this court are concerned, by the rulings in United States *v.* Britton, 108 U. S., 192, which applies to those particular statutes—to one in terms and to the other, which is *in pari materia*, by necessary implication—the ordinary permission to plead in the language of the statute.

The principles stated cover all which this court regards necessary to meet the questions raised by the indictments, which will now be disposed of.

The statute on which the indictment is based in No. 1211, U. S. *v.* Asa P. Potter, charging the illegal certification of checks, is a very apt one for the application of the ordinary rule that it is sufficient to allege an offence in the terms used by the legislature.

197 The word "certify" is of modern use and is not a technical term known to the law. It goes into the statute as popularly understood, and, being thus adopted by the law, it thus receives an authorized legal definition and interpretation and therefore is as good for the indictmant as for the statute. The proposition is entirely different from that arising when the statute is very general, or clearly omits an element in a criminal offence, because, as in this case, there is no settled legal or technical interpretation of the word to contravene any use of it which the statute may adopt; nothing is omitted.

Daniel on Negotiable Instruments (4th ed.), sec. 1603, says as follows: "Let us consider more at length the effect of the certification of checks. In the first place, the bank becomes at once the principal debtor." It is therefore plain that as Daniel uses the word certification, it covers everything needed to bind the bank, and also that this includes among other things a redelivery by the bank of the possession of the check, if the law supposes such redelivery a necessary element.

Moreover, there is nothing in this indictment nor is there anything in the nature of the transaction of certifying a check which raises any presumption of law that the check passes into the possession of the bank certifying it, and there is no occasion for an allegation of a redelivery when neither the indictment alleges delivery nor the law implies it.

If it should appear in defence that the checks did actually pass into the possession of the bank a different question might

198 arise, and probably it would be a sufficient answer to the indictment that they were not redelivered; but this need not be anticipated by the indictment, as indictments are not held to the strict rules applicable to pleas in abatement nor required to be certain to every intent. For this same reason Freund *v.* Bank, 76 N. Y., 355, does not aid the court. In that case the primary question was between different claimants of the check, and the bank would have been liable in some form of action if it had withheld it even without certifying.

The fact relied on by the accused that the indictment specifically alleges that the certification was by writing on the check is harmonious with the views that I have expressed, because, as the act of certifying does not in law imply that the check went into the possession of the bank, this specific allegation, even if it operates to limit the scope of the indictment to the fact of making the writing described, meets all the requirements of the statute. While the holder of a check or bill of exchange who presents it for acceptance cannot, by retaining it *manu suo*, do so in such manner as to prevent its inspection, he is not required by any rule of law to entirely part with its control or manual holding.

Touching the matter of authentication by the paying teller, it may appear at the trial that the certification was not complete without that authentication, and in that event the result may be that the United States will fail to prove its case or the defence will show a variance. This, however, is not the stage of the case when such matters are in issue. The counts expressly allege the certification to have been accomplished, and as they do not set out the purpose of the authentication, it cannot be presumed to be
199 any part of the certification. The word "authenticate," like the word "attest," has not a sufficiently definite signification to control the positive allegations contained in these counts.

The words in the indictment "amount of money equal," and so-forth, are the words of the statute. They constitute an awkward expression, but are not indefinite nor general, as claimed by the accused. They evidently mean in the statute the same as "as at least equal" or "so much money as." This is apparently one of the instances where the somewhat inapt, but not deficient, phraseology of the statute can be used by the pleader, under the general rule already referred to, without prejudice to the accused. No one can possibly misunderstand what is intended.

The counts denying that the amounts named in the checks have been "entered to the credit" of the drawers do not allege two offences. They only set out a multiplicity of circumstances, of which the United States may properly prove the whole or only a part. They are akin to indictments alleging burning of dwelling-houses in the night-time or thefts accompanied with breaking, of which the whole or part may be proven, even though if only part is proven, the grade of the offence is essentially lowered. It is claimed that this portion of these counts does not follow the terms or intent of the statute; but as the demurrers are to each count as a whole and enough remains even if this portion is invalid, this question cannot be considered at this stage of the case.

I must therefore hold valid all the counts in this indictment which charge Asa P. Potter with personally certifying checks, but I must hold invalid all those which charge him as only aiding and
200 abetting the cashier, Work, or, to put it more specifically, all which allege that the certification was done personally by the cashier. The statute on which this indictment is based, though extremely beneficial, has a very narrow range and must be interpreted accordingly. It does not reach overdrafts nor acceptances of

checks orally or by letter or telegraph. It was evidently aimed at only certain persons and a special method of transacting business, and it must be construed upon the same strict rules which it has applied to itself. It shows no intention of punishing any, except the officer of the bank whose hand committed the offence. I do not mean by this to exclude the common-law rule, *qui facit per alium facit per se*, or to hold that if either the president or cashier of a national bank unlawfully causes checks to be certified in his own name by his secretary or other amenuensis, or if the president so overpowers or intimidates the cashier that the latter in making the certification is the mere physical instrument of the former, the statute would not apply to the officer morally responsible; but these counts do not contain allegations going to this extent, for which more than the ordinary language in which aiding and abetting are charged, the words "counselled" and "commanded" not excepted, are required. So far as these counts are concerned, the cashier is the person subject to the penalty of the statute, if any one, and no other person can be charged under it.

I will add that I have not undertaken to examine this indictment, except upon the points to which counsel have called my attention. It was quite impracticable for me to go into it at large, and, con-
sidering the experience of the counsel, I have a right to
201 assume that it was unnecessary. Therefore the court stands
unprejudiced as to any other question which may be raised at any later stage.

While I have not yet been able to satisfy myself with the line of argument of counsel for Mr. Dana, based on the supposed history of legislation, I must, nevertheless, hold that indictments Nos. 1213 and 1214, against Thomas Dana and Jonas H. French, are not sustained by any statute. They are not based on the last clause of sec. 5209 of Revised Statutes, punishing aiding and abetting, but the accused are directly charged in their official character as directors with making false entries in reports to the comptroller.

Their specific duties as to such reports are covered by the words: "and attested by the signatures of at least three of the directors." By the statute these reports are required to be made "by the association," and to be "verified by the oath of the president or cashier." The provision for attestation by the directors was not in the banking act of 1864, but came in by the additional or amendatory act of March 3, 1869. No case has been cited, nor have I found one, where an indictment of this character has been sustained, unless it be United States *v.* Means, 42 Fed. Rep., 599. The report of this case covers only a charge to a jury, which, of course, never carries much weight as an authority. Moreover, the question involved here does not seem to have been discussed or specially considered. All the other cases have been against the cashier or president who verified the report. United States *v.* Britton, 107 U. S., 655, was a case of false entry in books by the president, an executive officer, and is not in any way analogous.

The indictments allege, in conformity with the statute, that
202 the reports were made by the association. They do not

charge that French or Dana made the reports or had any authority to make them, or that they were made by order of the directors, including French and Dana. The reports are set out in the indictments by their tenor. Those which the court have examined appear in the usual form, signed by the cashier, and verified by his oath, and attested, as required by statute, by three directors, including in some cases French and in others Dana.

It would be an unnatural and strained construction of the statute to hold that the words "false entry" mean "forged" entry, "fictitious" entry, or any other entry made by any person not authorized to make the report, or at least who did not make it. The context of the statute shows that the word "false" is used in contradistinction to the word "correct," and that the statute in this particular relates only to those who have the right or authority to make correct and true entries or reports, or who assume such authority, and to none others. Presumably these reports are made by the cashier or president, who, as the executive officers, are authorized to verify them; and presumably any entry made in them by any other person would not be a false one within the meaning of the statute, but fictitious, forged, or otherwise unauthorized. I make, however, the qualification that if the indictments alleged that the directors, as a board or otherwise, including the accused, authorized a report false in whole or in part, the case might stand differently.

I do not wish it understood that this conclusion rests on
203 any narrow ground. Giving the United States the full advantage of all that appears in the reports set out in the indictment, and assuming that French and Dana attested them, and that it was so alleged, yet with all that, and with whatever force may be given to the word "attested," it would still be certain that this word does not go so far as to intend that in any legal sense they made the reports or any entry in them. If French and Dana have by their attestation or otherwise, with criminal intent and knowledge, given currency to reports false in any particular, that portion of Revised Statutes, sec. 5209, which punishes those who aid or abet is especially apt to reach them. The existence of that appropriate provision warns the court that it ought not strain other portions of the statute to meet what this is intended to plainly and aptly cover.

204 *Completion of Opinion.*

(Filed Nov. 11, 1892.)

Coming to indictment No. 1212, against Asa P. Potter, those counts charging him with making false entries in reports and alleging that he was a director fall within the principles already stated by me with reference to the indictments against Jonas H. French and Thomas Dana. By well-known rules of pleading they can draw no aid from those counts which allege that he was also president, and they must be held invalid.

The criticisms on the use of the words "then and there" and the allegations of time in the counts charging false entries in reports

and alleging that the accused was president of the bank seem to require a refinement and strictness not known to the law. In innumerable instances known to every practitioner of experience, where there are set out many connected or related facts, though some may cover the whole of a day and others only an instant or a small part of a day, the words "then and there" are used interchangeably and without further specification, unless there is some presumption of law or necessity of pleading which does not exist in this case. The existence of the bank and the tenure of office by the accused are properly laid in terms to have the effect of a *continuando* and stand by themselves. All the other facts might in contemplation of law have occurred simultaneously or have taken only an instant in their occurrence or occupied the whole of a day, and there is no presumption of law which required that they
205 should be described as occurring in consecutive order. Edwards *v.* Commonwealth, 19 Pick., 124, was a special case and does not touch this general rule, and in United States *v.* Simmons, 96 U. S., 360, there was an entire failure to allege any time.

On principle, allegations of time in criminal pleadings ought to be made with approximate accuracy; yet by authority of a practice which has now continued so long that it must be yielded to, time need not be proved as stated, and these allegations are the most formal and useless portions of criminal pleadings. Of course exceptions are to be noted where the allegations of time are inconsistent or apparently bring the case within the bar of the statutes of limitations, and perhaps there are other exceptions; yet, as a general rule, statements of time may be so far varied from by the proofs that Judge Lowell, in United States *v.* Jackson, 2 Fed. Rep., 502, and Bishop on Criminal Procedure (3rd ed.), sec. 386, regard them as so wholly formal that they may be dispensed with under Revised Statutes, sec. 1025. United States *v.* Britton, 107 U. S., 655, holds, however, that there must be some allegation of time as well as place. But I am not now required to rule on the general proposition, and I refer to the statute only because it clearly renders unnecessary any more particularity than we find in the counts under consideration.

I am somewhat in doubt touching the omissions of the signs for dollars and cents and of the word "specie" in the recitals of the alleged false entries in the reports, but on the whole I think that there is enough left to identify beyond doubt the entries on which the counts are intended to be based, and that the omissions
206 are therefore mere "matter of form" within the meaning of Revised Statutes, sec. 1025. The same line of reasoning seems to meet the objection based on the apparent variance between the title of the bank as set out in the various counts and as appearing in the caption of the reports.

If necessary, the alleged misdescription of the character of the reports are met in the same way, as the reports are set out by their tenor and show for themselves what they are, and are fully described elsewhere in the body of each count. *Falsa demonstratio non nocet.* But the statute does not give these reports any designation of the

character which the counsel for the accused assumes. They are all reports of the condition of the bank within the meaning of the law; certainly all must admit that a detailed and tabulated statement of resources and liabilities is such, and in the absence of any statute designation they may well be so styled by the pleader.

In my opinion, it was not necessary to allege specifically that these reports were transmitted to the comptroller. That expression does not occur in the body of the enactment; but the word there used is "make," the present tense of the precise word used by the pleader. This necessarily includes the fact that the report reached the comptroller, and that the word "transmitted" is used subsequently in working out details does not make it an essential element in describing the offence; neither is the omission to allege that the reports were published of importance, because the offence, if committed, was complete before the required time of publication.

It seems to the court that the words "during all the times hereinafter mentioned" cover the twentieth day of February. While without Revised Statutes, sec. 1025, a more technical allega-
207 tion might be required, yet with it this is sufficient.

All the objections to the allegations of an intent to deceive or defraud or other intent are met, so far as this court is concerned, by the explicit approval by the Supreme Court in United States *v.* Britton, 107 U. S., 655, of two counts therein referred to. It is claimed by counsel that some of the propositions here presented and argued were not considered by the Supreme Court. Nevertheless this court is holden to accept its express language relating to the particular counts before it for its deliberation, and put in such form that it cannot be regarded as a mere dictum. If such rulings of the Supreme Court are to be reconsidered, it must be done by it and not by a subordinate tribunal.

There remain as to these particular counts but two propositions to be considered, one touching the fact that they do not set out that the reports were verified and attested, but on this point allege only that they were in the form required by law, and the other touching the claim that while they allege that the accused was president they do not allege that he acted in this matter as president or in the line of his official duty. Of course, setting out an instrument by its tenor does not supply the want of an allegation of its execution.

Ordinarily it is not sufficient in criminal pleadings to allege merely that a matter or thing conforms to law, but the details must be set out, so that the court can apply the law and determine for itself the validity or invalidity of the transaction or in-
208 strument. As to the other proposition, I have already laid down a rule in reference to the indictments against Jonas H. French and Thomas Dana, touching one who is presumably unauthorized or who has no color of authority. Can it be that those portions of Revised Statutes, sec. 5209, which punish the unauthorized issue of notes or certificates of deposit or unauthorized assignments or acceptances include mere forgeries, though

made by one within some of the classes designated in the section? Is it not true that, aside from the clause punishing those who aid and abet, the offence must include, first, that the offender is one of the enumerated classes; and, second, that he must have acted in the line of his authority or at least under color thereof? In other words, aside from the clause punishing those who aid and abet, does not the suggestion of a breach of trust or agency run through the whole?

These are fundamental and difficult questions which I am not willing to pass upon until they have been thoroughly and carefully re-argued in the light of the conclusions I have reached touching the indictments against Jonas H. French and Thomas Dana and of the doubts herein expressed.

I have already referred to the rulings of the Supreme Court in the United States *v.* Britton, 107 U. S., 655, touching certain counts there approved by it. That court was not content with merely overruling the objections raised and argued, but it went further and stated expressly that the counts were sufficient. Those, like the counts at bar, failed to allege in terms that the acts of Britton, who was charged with making false entries on the books of the bank and who was alleged to be its president, were in the line of
209 his duty or authority, or that in making them he acted as president; but, unlike the indictments against French and Dana, the counts did not state facts which raised the presumption that the acts charged were outside of and beyond his authority. If the counts at bar did not set out the reports by their tenor, showing that if they were made and verified by any one it was by the cashier, the allegations of the counts in the Britton indictment would meet this case; but as on the face of the reports it appears, at least presumptively, that they were not made through the president, this court, as already stated, desires to hear counsel further on the question whether or not, on the face of the reports, as set out by their tenor, the alleged false entries by the president can, in presumption of law, by anything other than fictitious, forged, or unauthorized, within the meaning of those terms as applied to the other indictments referred to, and also on all the other questions relating to the indictment in No. 1212 left open by this opinion.

On completion of the re-argument I will dispose of the demurrer to all the counts in the indictment, and for the present in No. 1212, United States *v.* Asa P. Potter, I will only pass the following order:

Ordered that the questions raised by the demurrers in this cause and left open by the opinion filed in No. 1211, United States *v.* Asa P. Potter, be re-argued.

A true copy.

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

210 *Bond to Prosecute Writ of Error.*

Know all men by these presents that we, Asa P. Potter, of Brookline, in the district of Massachusetts, as principal, and Granville T. W. Braman, of Cohasset, in said district, as surety, are held and

firmly bound unto the United States of America in the sum of two hundred and fifty dollars, to be paid to the said United States of America; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas the above-named Asa P. Potter has prosecuted a writ of error to the Supreme Court of the United States, returnable on the twentieth day of May, 1893, to reverse the judgment of conviction rendered by the judge of circuit court of the United States for the first circuit and district of Massachusetts in the cause entitled The United States of America, by indictment, *v.* Asa P. Potter, defendant, No. 1211 on the criminal docket of said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named Asa P. Potter shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ASA P. POTTER. [L. S.]
G. T. W. BRAMAN. [L. S.]

Signed, sealed, and delivered in presence of—
W. S. B. HOPKINS.

Approved:
WILLIAM L. PUTNAM,
U. S. Circuit Judge.
April 22, '93.

A true copy.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

211 *Order for Supersedeas, April* 22, 1893.

Whereas lately sentence has been pronounced against the said Asa P. Potter under said indictment, and a writ of error procured and served on the attorney of the United States for this district to reverse the judgment in this cause; and whereas a citation to the United States to be and appear at a Supreme Court of the United States, pursuant to said writ of error, has been issued—

It is ordered that the said writ of error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said writ of error.

By the court:
ALEX. H. TROWBRIDGE, *Clerk.*

A true copy.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

Order for Bail Pending Writ of Error, April 22, 1893.

Whereas lately, at the said circuit court, sentence was pronounced against the said defendant, and the said defendant having obtained a writ of error to remove the said cause to the Supreme Court of the United States to reverse the judgment therein, and a citation having issued to the United States to be and appear at the said Supreme Court pursuant to said writ of error, which citation has been served upon the attorney of the United States for said district—

It is ordered that the said defendant be admitted to bail pending said writ of error, and that he recognize with sufficient surety in the sum of four thousand dollars.

By the court:

ALEX. H. TROWBRIDGE, *Clerk.*

A true copy.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

212 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States begun and holden at Boston, within and for the district of Massachusetts, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two, to wit, April 22, 1893, in the case of The United States, by indictment, No. 1211, *versus* Asa P. Potter, defendant, personally appeared Asa P. Potter, of Brookline, in said district, and Granville T. W. Braman, of Cohasset, in said district, and acknowledged themselves to be severally indebted unto the United States of America in the sums following, viz., the said Asa P. Potter, as principal, in the sum of four thousand dollars, and the said Granville T. W. Braman, as surety, in the sum of four thousand dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said United States, if default be made in the performance of the condition following:

Whereas the said defendant has this day been ordered to be admitted to bail pending the writ of error issued in this cause, returnable to the Supreme Court of the United States on the twentieth day of May, A. D. 1893:

Now, the condition of this recognizance is such that if the said Asa P. Potter shall personally appear before the circuit court of the United States to be holden in Boston, within and for the district aforesaid, whenever required after the mandate of the said Supreme Court shall be received in this cause, to answer to such matters and things in the premises as shall be objected against him on behalf of the said United States, and more especially to such judgment as shall be awarded against him therein, and shall do and receive that which by this court shall be enjoined upon him in relation to the premises, and not depart without license, and shall meanwhile from term to term and day to day appear in this court whenever lawfully required in relation to the premises, then the above obligation

to be void and of none effect; otherwise to abide in full force, power, and virtue.

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

A true copy.

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

213 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, on the twentieth day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, in a cause entitled United States, by indictment, *versus* Asa P. Potter, defendant, wherein the said defendant is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William L. Putnam, judge of the circuit court of the United States for the district of Massachusetts, this twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-three.

WILLIAM L. PUTNAM,
Circuit Judge.

[Endorsed:] 1211. United States *v.* Asa P. Potter. Citation on writ of error.

214 I hereby accept service in behalf of the United States of the within citation.

Boston, April 22d, 1893.

FRANK D. ALLEN,
U. S. Att'y, Dist. Mass.

Endorsed on cover: Case No. 15,323. Massachusetts C. C. U. S. Term No., 531. Asa P. Potter, plaintiff in error, *vs.* The United States. Filed May 19, 1893.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ASA P. POTTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 939.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO ADVANCE.

The plaintiff in error respectfully urges that the motion does not comply with Rule 26, Sect. 6, which requires that "all motions to advance cases must be printed, and must contain a brief statement of the matter involved, *with the reasons for the application.*" No reasons are set forth in support of the motion.

Rule 26, Sect. 3, under which this motion is made, was interpreted in *United States* v. *Norton*, 91 U. S. 558 (October Term, 1875), in which case, as appears from the original record in this court, the motion was as follows:—

"At the request of the Post Office Department, the Attorney-General moves to have this cause advanced and set down for Tuesday, the fifteenth day of March, 1876. The grounds of this motion are that it is a criminal case, in which there is a certificate of division

of opinion upon the effect of certain statutes of limitation; and that the Postmaster-General states that it presents a matter of very great interest to his Department, upon which an adjudication at an early day is desired."

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court: —

"This is a criminal case. The motion to advance is made on behalf of the United States, upon the representation of the Postmaster-General, in substance, that the question in dispute will embarrass the operations of the government while they remain unsettled. As our rule has but recently gone into operation, we will, in this case, accept this statement as sufficient, and grant the motion. Hereafter, motions to advance upon this ground must state the facts in such manner that we may judge whether the government will be embarrassed in the administration of its affairs by delay."

United States v. *Norton*, 91 U. S. 558.

It is therefore respectfully submitted that the present motion should not be granted, no reasons being assigned for the application, and the plaintiff in error not consenting thereto.

W. S. B. HOPKINS,
ELMER P. HOWE,
for the plaintiff in error.

FILED.
NOV 5 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 531.

ASA P. POTTER, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

W. S. B. HOPKINS,
HENRY D. HYDE,
WILLIAM A. SARGENT,
of Counsel for Plaintiff in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 531.

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STATEMENT OF THE CASE.

This case comes up on writ of error from the Circuit Court of the United States for the District of Massachusetts.

An indictment under section 5208 of the Revised Statutes as amended by the act of July 12, 1882, sec. 13 (c. 290, 22 Sts. 162), was returned by the grand jury at the May term, 1892, of said Circuit Court against the plaintiff in error, charging him, as the president of the Maverick National Bank of Boston, with unlawfully certifying five certain checks drawn by Irving A. Evans & Company upon the Maverick National Bank of Boston. (Record, p. 114.)

Section 5208, Rev. Sts., is as follows: —

"It shall be unlawful for any officer, clerk, or agent

of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section fifty-two hundred and thirty-four."

The act of July 12, 1882, section 13, is as follows: —

"Sec. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."

The indictment, when presented, contained some eighty

counts, of which the first forty counts charged the unlawful certification of the five checks above named, the first eight counts charging the unlawful certification of the same check, Exhibit A; counts 9 to 16 charging the unlawful certification of the same check, Exhibit B; counts 17 to 24 charging the unlawful certification of the same check, Exhibit C; counts 25 to 32 charging the unlawful certification of the same check, Exhibit D, and counts 33 to 40 charging the unlawful certification of the same check, Exhibit E. (Record, p. 115.)

(For copies of checks, see Record, p. 124.)

Counts 41 to 64 charged the plaintiff in error with having aided and abetted the cashier in the certification of certain checks. Counts 65 to 80 charged the unlawful certification of two of the checks above named. (Record, p. 115.)

D murrers were filed to each count of the indictment, and on October 29, 1892, after argument, counts 41 to 64 were quashed by the court, and counts 1 to 40 and 65 to 80 were sustained by the court. Counts 65 to 80 were afterwards *nolle pross'd* at the trial. (Record, pp. 115, 116.)

Exceptions were taken and duly allowed by the court November 2, 1892, to the ruling of the court sustaining the validity of counts 1 to 40, inclusive, and 65 to 80, inclusive. (Record, p. 116.)

The exceptions taken were based upon the following grounds: That said counts are not sufficient in law, and do not set out any offence under the laws of the United States, in that said counts and each of them set forth the certification of a check simply by a writing upon said check, and fail to set forth any completion of the contract

of certification, and fail to set forth any delivery of said certification to any person whatever, and fail to set forth the creation of any contract of certification or liability whatever of the said association upon said check. (Record, p. 113.)

Another ground was that said counts were fatally defective in that the allegation, "amount of money equal to the amount specified," contained in each count, and forming a substantial averment thereof, was argumentative. (Record, p. 113.)

Another ground, as the case now stands, applicable only to counts 1, 9, 17, 25, 33, was that said counts were defective in failing to allege that the money was not on deposit at the time the paying teller authenticated the check specified in each of said counts. (Record, p. 114.)

The plaintiff in error then pleaded not guilty, and a trial was had.

At the trial the following vote of the directors of the bank was admitted in evidence: —

"BOSTON, Nov. 1, 1886

"Special meeting of the directors held to-day, Pres't Potter and Messrs. Mansfield, Woods, Dana and French being present. It was voted that the president, cashier or assistant cashier be authorized to certify any checks drawn on this bank, providing the bank is in funds for amount of said checks when the same are presented, all such checks when certified to be countersigned by paying teller.

"A. P. POTTER P.

"Attest J. W. WORK

"C." (Record, p. 116.)

The routine or method employed in the certification of the five checks, Exhibits A, B, C, D, and E, which was the usual course of procedure in the certification of checks of the bank, was as follows (Record, p. 119): —

There was evidence tending to show that Exhibits A, B, C, D, and E (copies being given at Record, pp. 124, 125), being all the checks set out in the indictment, were brought to the cashier's department either by the drawer or payee between ten and eleven o'clock in the morning on their respective dates, handed to a clerk, who stamped on them the certification stamp, a copy of which is hereinafter given. (Record, p. 116.)

The clerk who impressed the certification stamp examined, as part of his official duty, a pad or block which contained a list of accounts of active brokers who were likely to require certifications, which had previously been made up from the books and which showed a debit and credit account for each broker, showing the morning balance at the beginning of business, the amount of deposits during the day, and the amount of checks certified, being debited on this pad as they were certified. This pad or block, at the beginning of the day, showed the credit balance or debit balance, as the case might be, obtained, by the clerk keeping it, from the books. As deposits came in he was notified of them and credited them on this pad, and as checks were certified he debited their amounts on this pad.

Having ascertained how the account stood, the clerk receiving the check for certification impressed upon it the certification stamp and dated it, a copy of which is hereinafter inserted, and made out a charge ticket, so called, which was in effect a copy of the check, and took the check to the assistant cashier, if he were present, to have

the certification signed by him. In the absence of the assistant cashier, the check would be carried to the cashier, and in the absence of both the assistant cashier and the cashier, and not otherwise, it would be taken to the president for signature to the certification (Record, p. 119).

A copy of the certification stamp is as follows: —

"Maverick National Bank
"Certified
"Jul. 1891
"Pay only through Clearing House,
" —— —— Cashier.
" —— —— Paying Teller."

The check, together with a charge ticket, were then put into a cash-carrier system and sent to the paying teller, who put his initials upon the certification stamp against the words "Paying Teller," and passed the check through his window to the person waiting to receive the same, and put the charge ticket upon a spindle. (Record, p. 120.)

At the end of the day a "credit certified check ticket," so called, which was made up by taking the charge tickets off the spindle from time to time and listing them under the names of the respective drawers, was completed. The total amount of checks certified during the day were then credited upon the paying teller's book to the certified check account, and debited against the particular bank book on which the dealer's account was kept, which was known as the "Banks and Bankers' Balance Book No. 4," and was kept by a bookkeeper upstairs. (Record, p. 120.)

The credit certified check tickets afterwards went to the general bookkeeper downstairs, and the checks were listed by him upon a certified check book, so called, and were

credited upon the balance book of the bank when they came in through the clearing, and were paid. (Record, p. 120.)

The charge tickets were sent from time to time during the day to the bookkeeper, who had charge of the accounts of the drawer of the checks described on said charge tickets, and the amounts thereof debited to the account of the drawer of the certified checks. (Record, p. 120.)

It appeared in evidence that the plaintiff in error knew the method or course of business in the certification of checks recited herein. (Record, p. 139.)

And in regard to Evans & Company's checks, there was no different practice as to method of certification from the usual one used. (Record, p. 139.)

There was evidence tending to show that at the opening of business of the bank on July 23, 1891, the account of Irving A. Evans & Company showed a debit balance of $178,166.01. (Record, p. 120.)

That before ten o'clock in the morning, and before clearing, and before the certification on that day of any checks drawn by Evans & Company, Evans & Company deposited $50,000; that between twelve o'clock and half-past one o'clock Evans & Company made the second deposit, consisting of $85,363.62; and before three o'clock a third deposit of $12,100. (Record, p. 120.)

That the total charges against the account of Evans & Company upon that day, including interest of $25.88 upon the debit balance, and checks drawn by Evans & Company, which were either certified or paid upon that day, amounted to $157,261.97, the total deposits being $147,463.62. (Record, p. 120.)

That at the opening of business of the bank on July 24,

1891, the account of Irving A. Evans & Company showed a debit balance of $187,964.36.

That before ten o'clock in the morning, and before the certification on that day of any checks drawn by Evans & Company, Evans & Company deposited $55,000; that between twelve o'clock and half-past one o'clock, Evans & Company made a second deposit of $55,551.20, and before three o'clock a third deposit of $6770. (Record, p. 120.)

That the total charges against the account of Evans & Company upon that day, including interest of $25.27 upon the debit balance, and checks drawn by Evans & Company which were either certified or paid upon that day, amounted to $130,613.99; the total deposits being $117,321.20. (Record, p. 120.)

That at the opening of business of the bank on July 25, 1891, the account of Evans & Company showed a debit balance of $201,257.15.

That before ten o'clock in the morning, and before clearing and before the certification on that day of any checks drawn by Evans & Company, Evans & Company deposited $50,000; that later in the day Evans & Company deposited $93,119.27. (Record, p. 120.)

That the total charges against the account of Evans & Company upon that day, including interest of $53.23 upon the debit balance, and checks drawn by Evans & Company which were either certified or paid upon that day, amounted to $132,717.59, the total deposits being $143,119.27. (Record, p. 121.)

There was evidence tending to show that the certification pad or block kept in the cashier's department showed on the morning of July 23, 1891, and before the certification of any checks of Evans & Company on that day, against the name of I. A. Evans & Company the debit

balance of $178,166.01, and the first deposit of $50,000; that when the second deposit of $85,363.62 came in, it was credited upon this pad or block; that when the check Exhibit A was certified it was debited upon this pad or block. (Record, p. 121.)

That on the morning of July 24, 1891, and before the certification of any check of Evans & Company on that day, the said pad or block showed against the name of Evans & Company the debit balance of $187,964.36, and the first deposit of $55,000; that when the second deposit of $55,-551.20 came in, it was credited upon this pad or block; that when the checks Exhibits B and C were certified, they were debited upon this pad or block. (Record, p. 121.)

That on the morning of July 25, 1891, and before the certification of any check of Evans & Company on that day, the said pad or block showed the debit balance of $201,257.15, and the first deposit of $50,000; that when the next deposit of $93,119.27 came in, it was credited upon this pad or block; that when the checks Exhibits D and E were certified, they were debited upon this pad or block. (Record, p. 121.)

There was evidence tending to show that before the checks Exhibits A, B, C, D, and E severally were presented to the defendant for certification, the clerks presenting the same ascertained that there was a deposit shown upon the said block or pad, and it was part of their duty to ascertain this fact. (Record, p. 123.)

There was evidence tending to show that on each day during the month of June and July, 1891, prior to July 23, 1891, the account of Irving A. Evans & Company showed at the opening of each day a large debit balance; that interest was each day charged upon the same, and that large

deposits were made each day by Evans & Company. (Record, p. 123.)

There was evidence tending to show that the debit balance at the beginning of each day's business during June and July, 1891, was obtained by taking the debit balance of the morning previous, adding to the same all charges against the account for that day, and deducting therefrom all deposits made during that day, thus balancing the account at the end of that day, which balance then became the debit balance of the next morning. (Record, p. 123.)

There was evidence tending to show that the signature A. P. Potter, Pt., in the certification stamp, was the defendant's and that the initials A. C. J. were written by A. C. Jordan, the paying teller. (Record, p. 124.)

The government offered five checks in evidence, Exhibits A, B, C, D, and E (Record, p. 124), and offered to read the certifications thereon to the jury.

The defendant objected to the reading the above certifications on Exhibits A, B, C, D, and E to the jury for the following reasons: —

1. In view of the evidence of the vote of the directors on November 1, 1886, which has been admitted (heretofore recited), and the evidence of the method of certification of checks in this bank, which has been testified to (heretofore recited, Record, p. 126), the evidence offered shows a certification bearing the initials of the paying teller as his signature in countersigning the certification, which we claim is an integral and essential part of the certification, and which is not set forth at all as such in the 1st, 2d, 3d, 4th, 7th, and 8th counts of the indictment in each set of eight counts, and which is set forth in the 5th and 6th counts only as being made by the accused, while the evidence shows

that the countersigning was done by the paying teller, A. C. Jordan.

As to all counts, we claim a variance which renders the proffered evidence inadmissible.

2. We claim that this variance appears as a matter of law, and that the evidence offered is not admissible or competent on any question to the jury as to whether it is a part of the certification.

The court thereupon allowed the certification to be read to the jury, and the defendant excepted to the introduction of the said certifications in evidence for the above reasons. (Record, pp. 125, 126.)

During the trial, William S. Bliss was allowed to testify under the objection and exception of the plaintiff in error that two checks drawn by Evans & Company, were certified.

Five conversations were testified to, two being in June, 1891, and three in July, 1891, the witness being unable to fix the date more definitely.

The conversations were substantially similar, the third conversation being as follows: —

> "I went over to get a check certified, one of the firm checks, and would speak to Mr. Potter and say that Mr. Evans had sent me over, and he said that Mr. Evans had not kept his word and had not done right in not reducing the over-draft and the loan."

These conversations being in, in the last two conversations the witness was allowed to testify against the objection and exception of the plaintiff in error that in each case the check presented was then certified.

The exception was put upon the ground that the evidence tended to prove an immaterial and incompetent fact relating to the certification of another check at another time immaterial to the only ground upon which the inquiry could be entered into, that is, the knowledge of the existence of the overdraft or overdraft loan. (Record, p. 126.)

During the trial, the court admitted in evidence six checks other than those contained in the indictment, certified by the defendant, part on July 23 and part on July 24, 1891, all being checks drawn by Irving A. Evans & Company on the Maverick National Bank, being offered by the government on the ground that they were the acts of the plaintiff in error, and assisted in proving, or had a tendency to prove, knowledge on the part of the plaintiff in error as to the condition of that account, the amount of deposits or overdraft.

The plaintiff in error objected to their admission on the ground that they were an attempt to prove other acts which might or might not be in connection with the accounts of the same day, which might or might not be criminal in their character, and on the ground that they were irrelevant to the proposition touching knowledge and intent in the certification of the checks that are included in the indictment, and, being other substantive facts and occasions, they are not admissible for the purpose for which they are offered, and also that they could only be admissible as proof of other transactions which would require the same proof, under the statute, that the facts existed which would make the certification of each individual check a criminal offence as applied to the certification of the checks set forth in the indictment.

The court said that he would put the responsibility upon the United States, and admitted the above certification of

checks in evidence, so far as they were certified before Exhibit E, on July 25, 1891.

The plaintiff in error excepted for the above reasons; and the above checks as certified, six in number, Exhibits 37, 38, 39, 40, 41, 43, that were certified on July 23 and 24, 1891, were read in evidence. (Record, p. 127.)

During the trial, the plaintiff in error called Joseph W. Work, the cashier, and asked him, "What was that debit balance between Evans & Company and the bank?" The government objected, and the plaintiff in error offered to show that the apparent overdraft debit balance due from Irving A. Evans & Company to the bank, arising out of the account current on each of the mornings, was treated by both parties, under an understanding between them, as a loan on which daily interest was charged, the interest being figured on the amount of money the bank was out of during the day, and that the indebtedness was ascertained at the end of each day by balancing the account at the end of each day, and that this arrangement was carried out by a deposit of collateral in the hands of the assistant cashier, and that there was a general limit to this loan of about $200,000, not to exceed it (Record, pp. 128, 129), the propositions of the plaintiff in error being, (1) that a loan may be created by an arranged overdraft; (2) that, if a loan be created by an arranged overdraft, it may be carried legitimately as a loan.

The court ruled out this question and this offer of evidence, and the plaintiff in error excepted. (Record, p. 129.)

The defence called the defendant, Mr. Potter, and offered to prove by him an oral agreement between I. A.

Evans & Company and the Maverick National Bank in the early part of 1891, before June or July, 1891, that Evans & Company might have a loan by overdraft limited to $200,000, with interest to be charged daily at the rate of six per cent, against which collateral was to be put up, and further to show that the overdrafts existing in June and July, 1891, were under this agreement, and that collateral was actually deposited and kept against it in the hands of the assistant cashier; that this agreement was communicated to the executive officers of the bank, and to a majority of the directors of the bank, who approved it, and this offer was made in connection with the facts that appear in evidence in relation to the books of the bank. Also the defence offered another conversation between Mr. Potter and Mr. Evans in relation to the matter of certification of checks and deposits connected with this certification, in which Mr. Evans called his attention to the fact that a check had been refused certification, and Mr. Potter told Mr. Evans that it was undoubtedly because he had no deposit there. Whereupon Mr. Evans said, "But I have a loan, as I understand it;" to which Mr. Potter replied substantially, "We cannot certify checks against a loan; if you are going to have certified checks, you must have deposits in the bank to certify them against;" and that from that time forward the deposits were in, to Mr. Potter's knowledge, from day to day after this conversation with Mr. Evans, in which the defence claims that the parties to the conversation understood distinctly that the daily deposits were to be in for the very purpose of certifying checks.

This whole offer was made by the defence as material matter of substantive defence as part of the *res gestæ* and

of the transaction, and as specifically bearing upon the question of criminal intent upon the part of the defendant.

The facts "that appear in evidence in relation to the books of the bank," as referred to in the above offer and in connection with which the offer is made, are hereinbefore fully stated in the bill of exceptions. (Record, p. 129.)

The defence then put the following questions to the witness, the plaintiff in error, for the purpose of proving the facts set forth in the above offer of evidence: —

> "*Q.* Did you have any conversation with Irving A. Evans prior to June and July, 1891, as to over checks?"

The witness answered, "Yes," and was then asked, —

> "*Q.* Give that conversation.
>
> "[Objected to by the government and excluded; and exception taken by the defence.]" (Record, p. 133.)

The defence asked Mr. Potter, —

> "Now I ask this question as bearing upon the same conversation: was such a conversation communicated to the cashier and to a majority of the directors of the bank?"

This was objected to by the government, excluded by the court, and exception taken by the defence. (Record, p. 134.)

The defence asked Mr. Potter, —

> "What do you know in regard to the depositing of money by Irving A. Evans & Company in the Maverick Bank from day to day?"

The Government. — "Wait a moment."

The Court. — "It is excluded."

The Defence. — "Note my exception."

The Court. — "One moment: does that question bear upon the same subject matter you have been talking about?"

The Defence. — "Yes, your honor; that is to say, the conversation in regard to the necessity of having deposits that I opened in my offer."

The Court. — "Then I exclude it."

The defence excepted. (Record, p. 134.)

The defence asked Mr. Potter the following question: —

> "I will ask another question: whether or not you know there were deposits of money by Irving A. Evans & Company in the Maverick Bank made from day to day?"

The Government. — "I object to that."

The Defence. — "In the same connection?"

The Court. — "If it is in the same connection, I exclude it. If it is not in the same connection, I admit it."

The Defence. — "The books would show it. I offer it in connection with what I have already said because the books show the facts."

The Court. — "I exclude it:" and the defence excepted. (Record, p. 134.)

The defence asked Mr. Potter after he had been permitted to testify that he knew there was a deposit of Evans & Company to meet it at the time of the certification of Exhibit A, the check for $2450, on which the first eight counts of the indictment are based (Record, pp. 134, 135):

> "*Q.* What was your belief in regard to your right to certify a check as against that deposit?"

This question was excluded by the court and exception taken by the defence. (Record, p. 135.)

After Mr. Potter had been allowed to testify that he knew there was a deposit of Evans & Company to meet them at the time of the certification of each of the Exhibits B, C, D, and E, which are the remaining checks covered by the indictment, counts 9 to 16 being devoted to Exhibit B, counts 17 to 24 being devoted to Exhibit C, counts 25 to 32 being devoted to Exhibit D, and counts 33 to 40 being devoted to Exhibit E, the defence asked him the following question: —

> "*Q.* Whether in each of these certifications it was your belief that you had a right to certify against that deposit?"

This question was excluded by the court and exception taken by the defence. (Record, p. 135.)

After the defendant had testified that there were deposits from day to day during the month of June and July, the defence asked the defendant, —

> "What was your belief as to your right to certify checks as against daily deposits with the knowledge of the debit balance that stood in Evans & Company's account, and the condition of his account on the books of the bank?
>
> "[Objected to by the government, excluded by the court, and the defendant excepted.]" (Record, p. 137.)

The defence asked the defendant, —

> "*Q.* Was there ever, prior to July 21, 1891, any talk between you and Mr. Evans as to his deposits

and certifications as they related to each other, giving the conversation?

"[Objected to by the government, excluded by the court, and exception taken by the defendant.]" (Record, p. 137.)

At the close of the evidence, the plaintiff in error requested certain instructions to the jury which the court declined severally to give, and which are stated in full in the exceptions and the assignment of errors.

After the judge's charge was given, and before the jury retired, the defendant excepted to the following portion of the judge's charge regarding the countersigning by the paying teller, as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts stated in the bill of exceptions.

The portion excepted to is, —

"The point is taken by the defendant that Mr. Potter had not power alone to certify checks; that in order to certify checks to bind the bank, the signature of the paying teller was also necessary, or his initials. I will define that hereafter; but if you find such to have been the fact, you will render a verdict of not guilty upon this entire indictment, because then there is or would be a variance in the proof. If you should find the fact to be as claimed by the defendant on this point, it is enough for me to say that, for reasons touching the allegations of the indictment as appearing in the light of the evidence in the case, you must render a verdict of not guilty upon this entire indictment.

"I ought to explain what is meant in this connection by the authority of the president to bind the bank by

certification. In the first place, I have no reference to the obligations of the bank to a third person who might innocently purchase or obtain a check certified by the president in ignorance of the by-laws or course of proceedings of the bank, or of the actual authority which the president was, by the practice of the bank or the votes of the directors, empowered to use. Neither is it a question whether the checks without the authentication of the paying teller would be good delivery at the clearing house. Probably, if this by-law was posted at the clearing house, checks not authenticated would not be good delivery. I don't know about that, and neither you nor I need trouble ourselves about that. What I mean is this, to state it as accurately as I can: if the president of this bank, according to the vote of the directors and the course of business of the bank, was not authorized to certify these checks as between the bank and others, knowing all the facts, without the authentication of the paying teller, so that, as to persons who knew all the facts, the certification would not bind the bank without the authentication of the paying teller, this indictment cannot be sustained and you must find a verdict for the defendant. Now upon that point the United States put in the vote of the directors that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, provided the bank has any funds for the amount of said checks when the same are presented. Here comes the clause which is so important in this case: 'All such checks when certified, to be countersigned by the paying teller.' Now, gentlemen, if the case stood upon that vote alone, so that it was a pure question of law for the court to instruct you about, I should advise

you that that vote was merely directory, and that the bank was bound by a certification, although the check got out without the authentication of the paying teller, and that the fact that the indictment does not allege with reference to the certification other than it does allege on this point, and the fact that the United States has not proved other than it has proved upon this point, would afford no defence to this case. I instruct you that, *prima facie* upon this vote, such is the state of the law with reference to this case. But this is a criminal case, and I cannot take the facts from you, and you are entitled to bear in mind that any vote of the directors establishing a certain order of things upon this point or any other is controlled by the course of business at the bank, and must be practically construed in the light of the course of business at the bank, and if upon the proofs in this case altogether, taking this vote with the rest, you are not satisfied beyond a reasonable doubt that the president was authorized to bind the bank by his certification, you must find a verdict for the defendant upon the whole indictment. You are to consider in this connection whether the act of the paying teller, either as required by this vote or as practised in the ordinary course of business at the bank, was anything more than for the purpose of enabling him to keep a record of the checks that were certified in order that he might know the state of the account of a customer of the bank, or whether it was for the purpose of uniting with the president in binding the bank by a joint certification, or by the joint act of him and the president. I can only say, gentlemen, that if you find in the practice of the bank something which, taken with this vote, leaves upon your mind a reason-

able doubt upon this branch of the case, you must return a verdict for the defendant. In other words, the United States, taking this vote, and what appears here concerning the course of business at the bank and other facts laid before you touching this matter, must prove this part of the case in connection with others beyond a reasonable doubt." (Record, pp. 162–164.)

Second. The defendant excepted to that portion of the judge's charge relating to the making of deposits and their *prima facie* absorption when entered into a single account, as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill. The portion excepted to is, —

"Then comes the allegation that the said persons, that is, Irving A. Evans & Company, did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of $2450 in money.

"Now, gentlemen, what I have to say to you touching that proposition comes down, I think, practically and substantially to one question. I ask you first of all, gentlemen, to determine whether or not the overdrafts, so called, of Irving A. Evans & Company, on the morning of these days, the 23d, 24th, and 25th, days of July, and at the evening or close of the 23d or 24th, appeared on the books of the bank in the account, and in the same account in which the deposits and checks of Evans & Company were usually credited and charged, and whether this account is the ordi-

nary deposit account such as was kept with other depositors, or was kept upon the books of the bank, making no distinction for this purpose between individual depositors and banks, although there must have been some separation by carrying them upon separate books. Then, gentlemen, I ask you to determine whether or not the checks deposited by Evans & Company on these days, or the other deposits made by them, went through the regular and usual course customary at that bank with checks deposited by customers, and whether they went or not finally upon this account, in which appear the overdraft that I have spoken of. And I ask you further to determine whether or not this course of business at the bank was recognized by Evans & Company, and whether or not Evans & Company permitted corresponding entries to be made upon their pass books daily. If you find those facts in the affirmative, then the question under this statute is not what was agreed to be done, but what was done; and I say to you that, *prima facie*, the deposits, as they came in later, were in fact applied towards the liquidation of the overdraft which appeared each day at the commencement of business, and were thus absorbed; and that as it is apparent and admitted that the entire amount of deposits was not equal to the overdraft with which the day commenced, you should consider that, as a matter of fact, there were no moneys on deposit at any portion of the 23d, 24th, or 25th of July, against which checks could be certified. But, gentlemen, it is claimed upon the other side that, notwithstanding the facts to which I have called your attention, certain deposits were set aside for the purpose of meeting or covering checks

that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks were so treated by the bank as to become themselves a deposit in some form, would not sustain a defence in this case. I instruct you that the setting aside of a check temporarily, or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it, would not meet the purpose of this statute unless it was made itself the basis or a part of a deposit. And I instruct you, gentlemen, that unless the defence can show or does show that, as a matter of fact, certain checks were set aside, not as a matter of agreement, not that there was an agreement to do so, — but unless they show to you that, as a matter of fact, certain checks were set aside as a deposit, according to the ordinary course in the proper course of business, and appearing on the books and papers of the bank as against which checks might be certified, this proposition will not avail the defence." (Record, pp. 164, 165.)

Third. The defendant excepted to that portion of the judge's charge regarding the burden of proof being on the defence to show that a separation or segregation of certain deposits was made to certify against, the defendant's contention being that the burden of proof was upon the government to establish beyond a reasonable doubt every point essential to the proof of the case.

The portion excepted to is, —

"But, upon some reflection, I have come to the conclusion that, notwithstanding Evans & Company may have been overdrawn on the morning of any

particular day and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain checks or other moneys and hold them for the purpose of covering the certified checks, that it would not be any violation of letter or policy of the statute, and would be a defence. But I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable to see in the case any evidence, — I do not mean to say evidence of what was intended or agreed to be done which is not essential to this case, but any evidence that as a matter of fact any of these checks deposited by Evans & Company did not go into the general deposit account and were not absorbed the instant they passed into the bank. Upon this branch of the case I instruct you the burden of proof is on the defence. Not proof beyond a reasonable doubt, but to satisfy you by the preponderance of evidence. If the defence does satisfy you by the preponderance of evidence that there was a segregation in fact appearing upon or shown from the books and papers of the bank, a segregation, a setting apart of certain deposits, sufficient to cover the certified checks, and against which the checks were certified, it is a defence in this case." (Record, p. 166.)

The defendant further excepted to the following portion of the judge's charge as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

The portion excepted to is as follows: —

"On the other hand, the position taken by the

counsel for the United States is perfectly correct. This statute is a law for the regulation of banking business; its provisions are arbitrary, but are to be obeyed. And yet they are of that character that, while the United States must prove knowledge and wilfulness, it is not necessary that the United States should prove that the defendant was guilty of a corrupt purpose, guilty of moral turpitude, guilty of fraudulent intent, or guilty of an injurious purpose, except so far as the word injurious is a technical word and implied in every unlawful act by force of law. And a conviction of an offence under this statute does not imply that the defendant has been guilty of any of those things, although the maximum penalty is so large that there may be an opportunity for considering such things upon hearing the facts pertinent when sentence is pronounced; but here there are no considerations of that character whatever. The offence under this statute may be committed under such circumstances as need not imply any of these things. Certainly it is not for the United States to prove them, and the United States are perfectly right in saying they are not bound to prove any of these corrupt purposes." (Record, p. 166.)

The defendant excepted to the following portion of the judge's charge, in view of the exclusion of evidence of belief heretofore recited, and as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill: —

" And, gentlemen, I ought to add that while ignorance of the law is not an excuse, sometimes igno-

rance of fact based upon ignorance of the law is an excuse. And if in this particular case it is true, or should be found by you to be true, as claimed by the defence, that the defendant acted upon the belief that the law authorized him to certify checks against the morning deposits, and for that reason, when the question of certifying checks was before him, kept in mind only the morning deposits, and was ignorant for that reason of the general condition of the accounts, that fact would have great weight, very great weight, upon the question of knowledge to which I call your attention." (Record, p. 166.)

The jury returned a verdict of guilty on the following counts: Nos. 1, 3, 7, 9, 11, 15, 17, 19, 23, 25, 27, 31, 33, 35, 39; and not guilty on the following counts: 2, 4, 5, 6, 8, 10, 12, 13, 14, 16, 18, 20, 21, 22, 24, 26, 28, 29, 30, 32, 34, 36, 37, 38, 40. (Record, p. 167.)

On April 22, 1893, the plaintiff in error was sentenced to imprisonment in the jail at Cambridge for the term of sixty days, and to pay a fine of $1000. (Record, p. 167.)

The sixty-sixth assignment of error is that the court erred in its judgment entered April 22, 1893, in said cause, in sentencing the defendant, as neither the record nor the verdict of guilty severally rendered on each of the following counts, — 1, 3, 7, 9, 11, 15, 17, 19, 23, 25, 27, 31, 33, 35, 39, — warranted or authorized the infliction of any sentence, or constituted a valid conviction under the laws of the United States.

The record and bill of exceptions show that counts 1, 3,

and 7 were based upon and severally charged the unlawful certification of a single check numbered 54,493, dated Boston, July 23, 1891, drawn by Irving A. Evans & Company upon the Maverick National Bank, payable to the order of Hayward & Townsend, for the sum of $2450.

As to these three counts the record and bill of exceptions show that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts, or all three, and attempt to sentence thereunder.

The same objection holds good as to each set of these counts, there being five sets of three counts each. (Record, pp. 189, 190.)

ASSIGNMENT OF ERRORS.

(Filed April 22, 1893.)

Afterwards, to wit, on the second Monday of October, in the year of our Lord eighteen hundred and ninety-three, at the October term for eighteen hundred and ninety-three of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Asa P. Potter, by W. S. B. Hopkins, his Attorney, and says that in the record and proceedings in the above entitled matter there is manifest error, to wit:

1. The circuit court has erred in overruling the demurrers to counts 1 to 40, both inclusive, and in sustaining the validity of said counts, in that said counts, and each of them, are not sufficient in law and do not set out any offence under the laws of the United States, in that said

counts, and each of them, set forth the certification of a check simply by a writing upon said check, and fail to set forth any completion of the contract of certification, and fail to set forth any delivery of said certification to any person whatever, and fail to set forth the creation of any contract of certification or liability whatever of the said association upon said check.

2. The circuit court has erred in overruling said demurrers and sustaining said counts 1 to 40, both inclusive, in that said counts, and each of them, are fatally defective in that the allegation, "amount of money equal to the amount specified," contained in each count and forming a substantial averment thereof is argumentative.

3. The circuit court has erred in overruling said demurrers and sustaining counts 1, 2, 9, 10, 17, 18, 25, 26, 33, 34, in that said counts, and each of them, are defective in that they fail to allege that the money was not on deposit at the time the paying teller authenticated the check specified in each of said counts.

4. The circuit court has erred in admitting in evidence the certifications upon Exhibits A, B, C, D, and E, the checks the certifications of which are complained of in the indictment, to be read to the jury, inasmuch as there was a variance as a matter of law between the allegation in each count of the indictment that the defendant certified the said checks by writing, putting, and placing thereon the words and figures following:

Maverick National Bank.
Certified Jul- 23, 1891.
Pay only through the clearing-house.
A. P. POTTER, *P.*
—— ——, *Paying Teller.*

and the evidence that the checks in question were certified under the following vote of the bank:

"Voted, that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, providing the bank is in funds for amount of said checks when the same are presented; all such checks when certified to be countersigned by paying teller.

A. P. POTTER, *P.*

Attest: J. W. WORK, *C.*"

and the evidence that, according to the custom of the bank, the paying teller countersigned each certification, and each certification offered in evidence showing, as a matter of fact, the initials, A. C. J., of the paying teller upon the certification stamp opposite the words paying teller, written upon the same by the paying teller, A. C. Jordan, the defendant claiming that, as matter of law, under the vote of the directors and the custom of the bank, the initials of the paying teller, as his signature, in countersigning the certification was an integral and essential part of the certification, and which was not set forth at all as such in the 1st, 2nd, 3d, 4th, 7th, and 8th counts of the indictment in each set of eight counts (there being eight counts devoted to each check), and which is set forth in the 5th and 6th counts of each set of eight counts only as being made by the accused, while the evidence showed that the countersigning was done by the paying teller, A. C. Jordan.

The defendant claimed a variance existed as to the counts which rendered the proffered evidence inadmissible, and that the variance appears as matter of law.

5. The circuit court has erred in admitting in evidence the fact that on four different occasions — two in June, 1891, and two in July, 1891 — another check drawn by

Evans & Co. upon the Maverick National Bank of Boston and not referred to in the said indictment was certified.

"During the trial William S. Bliss, a partner of the firm of Irving A. Evans & Co., was allowed to testify to two conversations with the defendant occurring sometime in the month of June, 1891, and two conversations with the defendant occurring sometime in the month of July, 1891, the witness being unable to fix the date of these conversations more definitely, to the effect that he would see Mr. Potter and state that he had come over to get a check certified. Mr. Evans requested him to do so; and Mr. Potter would state that Mr. Evans had not kept his word, had not done right; had not reduced the overdraft or loan.

"The witness was then asked, on four different occasions after the above conversations had been testified to, by the Government, 'Was the check then certified?' The defendant objected upon each of the four occasions on the ground that it was proving an immaterial and incompetent fact relating to the certification of another check at another time, immaterial to the only ground upon which this inquiry could be entered into — that is, the knowledge of the existence of the overdraft or overdraft loan."

"The witness was allowed to answer upon each of the four occasions, the answer being yes, and the defendant excepted upon each occasion to the admission of this evidence."

6. The circuit court has erred in refusing to admit the evidence set forth in the following offer of proof made by defendant:

The counsel for the defence called Joseph W. Work, the cashier, and interrogated him as follows:

Q. What was that debit balance between Mr. Evans & Company and the bank?

To this question the Government objected.

The counsel for the defence thereupon stated that the inquiry related to "the nature of the account."

In this connection the counsel for the defence made the following offer: "My offer is to show by this and other witnesses that the apparent overdraft, debit balance, due from Irving A. Evans & Co., to the bank, arising out of the account current, on each of the mornings was treated by both parties, under an understanding between them, as a loan, on which daily interest was charged, the interest being figured upon the amount, which was ascertained after clearing — the amount of money, ascertained after clearing, that the bank was out during the day, what the bank was out of one day — as the sum which in justice interest should be paid upon; and that the indebtedness was ascertained at the end of each day by balancing the account at the end of each day; and that this arrangement was carried out by a deposit of collateral in the hands or in the department of the assistant cashier, who was the usual certifying officer of the bank."

The COURT: "Have you in this connection any entries upon the books of the bank to put in?"

The counsel for the defence thereupon replied: "The entries of these balances, I believe, are in. The entries of interest are in — that is, if they are not in I should offer them."

The COURT: "They are in. Have you any other entries upon the books of the bank to go in, in connection with this subject-matter?"

Counsel for the defence thereupon replied: "I have not, your honor. I think, if your honor please, all these entries have been called to the attention of the jury, unless there may be entries upon the teller's book of interest that have

not been testified to as interest. I understand that the interest was cast by Mr. Domett, ordinarily the assistant cashier, who had the run of the loan, and I understand that he — I speak a little hesitatingly because I am not quite sure, but I think, these entries went on the books of the teller; at any rate, they went on the books of Mr. Moore, and that is in."

The COURT: "Well, besides the entries of interest, have you any other entries in this connection?"

A. "I think not; I don't remember any other."

Counsel for the defence thereupon stated as follows: "Now, if your honor please, the first proposition that I have to make is this: . . . In the first place, a loan may be created by an arranged overdraft. Our second proposition is that if a loan is created by an arranged overdraft it may be carried legitimately as a loan."

The COURT: "Let me ask you before your remarks whether you propose to show that what you call a loan was for any specific amount?"

Counsel for the defence: "Only at this period of time we are discussing there was what you may call a general limit of about $200,000 — that is, not to exceed it.

"The figures that have been put in run from $120,000, I think, in June up to $200,000 on one of these three days, but no actual, absolute limit, but a limit of about $200,000, which you may call a limit."

Upon the objection of the Government the court ruled out this question and this offer of evidence, and the defendant excepted.

7. The circuit court has erred in admitting in evidence the certification by the defendant of six checks drawn by Irving A. Evans & Co. upon the Maverick National bank, dated July 23d and 24th, 1891, respectively, and certified

on July 23d and 24th, 1891, respectively, said checks being for varying amounts, and both checks and the certifications thereof being substantially in the same form as checks Exhibits A, B, C, D, and E, with the certifications thereof as set out in the bill of exceptions, which is hereby made part hereof for the purposes of describing said checks.

The admission of these certifications was objected to on the ground that it was an attempt to prove other acts which might or might not be in connection with the accounts of the same day, which might or might not be criminal in their character, and on the ground that they were irrelevant to the proposition touching knowledge and intent in the certification of checks included in this indictment, and that they could only be admissible as proof of the transactions which would require the same proof under the statute, that the facts existed which would make the certification of each individual check a criminal offence, as apply to the certifications of the checks set forth in the indictment.

8. The circuit court erred in refusing to admit the evidence set forth in the following offer of proof made by the defendant:

The defence called the defendant, Mr. Potter, and offered to prove by him an oral agreement between I. A. Evans & Co. and the Maverick National bank in the early part of 1891 — before June or July, 1891 — that Evans & Co. might have a loan by overdraft limited to $200,000, with interest to be charged daily at the rate of six per cent., against which collateral was to be put up, and further to show that the overdrafts existing in June and July, 1891, were under this agreement, and that collateral was actually deposited and kept against it in the hands of the assistant cashier; that this agreement was communicated to the executive officers of the bank and to a majority of the

directors of the bank, who approved it, and this offer was made in connection with the facts that appear in evidence in relation to the books of the bank; also the defence offered another conversation between Mr. Potter and Mr. Evans in relation to the matter of certification of checks and deposits connected with this certification, in which Mr. Evans called his attention to the fact that a check had been refused certification, and Mr. Potter told Mr. Evans that it was, undoubtedly, because he had no deposit there; whereupon Mr. Evans said, "But I have a loan, as I understand it;" to which Mr. Potter replied substantially, "We cannot certify checks against a loan; if you are going to have certified checks, you must have deposits in the bank to certify them against;" and that from that time forward the deposits were in, to Mr. Potter's knowledge, from day to day, after this conversation with Mr. Evans, in which the defence claims that the parties to the conversation understood distinctly that the daily deposits were to be in for the very purpose of certifying checks.

This whole offer was offered by the defence as material matter of substantive defence, as a part of the *res gestæ* and of the transaction, and as specifically bearing upon the question of criminal intent upon the part of the defendant. The facts "that appear in evidence in relation to the books of the bank," as referred to in the above offer and in connection with which the offer is made, are heretofore fully stated in this bill of exceptions.

The defence then put the following questions to the witness, the defendant, for the purpose of proving the facts set forth in the above offer of evidence:

Q. Did you have any conversation with Irving A. Evans prior to June or July, 1891, as to overchecks?

A. The witness answered yes; and was then asked:

Q. Give that conversation.

Objected to by the Government and excluded, and exception taken by the defence.

9. The circuit court erred in excluding the following evidence, the same being based upon the offer of proof set forth in the preceding assignment of error, which is hereby made part hereof:

The defence asked Mr. Potter: "Now, I ask this question as bearing upon the same conversation: Was such a conversation communicated to the cashier and to a majority of the directors of the bank?" This was objected to by the Government, excluded by the court, and exception taken by the defence.

10. The circuit court erred in excluding the following evidence, the same being based upon the offer of proof set forth in the 8th assignment of error herein, which is made part hereof.

The defence asked Mr. Potter: "What do you know in regard to the depositing of money by Irving A. Evans & Co. in the Maverick bank from day to day?"

The GOVERNMENT: "Wait a moment."

The COURT: "It is excluded."

The DEFENCE: "Note my exception."

The COURT: "One moment. Does that question bear upon the same subject-matter you have been talking about?"

The DEFENCE: "Yes, your honor; that is to say, the conversation in regard to the necessity of having deposits, that I opened in my offer."

The COURT: "Then I exclude it."

The defence excepted.

11. The circuit court erred in excluding the following evidence, being based upon the offer of proof set forth in

the 8th assignment of errors herein, which is made part hereof:

The defence asked Mr. Potter the following question: "I will ask another question: Whether or not you know there were deposits of money by Irving A. Evans & Co. in the Maverick bank made from day to day?"

The GOVERNMENT: "I object to that."

The DEFENCE: "In the same connection."

The COURT: "If it is in the same connection, I exclude it. If it is not in the same connection, I admit it."

The DEFENCE: "The books would show it. I offer it in connection with what I have already said, because the books show the facts."

The COURT: "I exclude it."

And the defence excepted.

12. The circuit court erred in excluding the following evidence:

The defence asked Mr. Potter, after he had been permitted to testify that he knew there was a deposit of Evans & Co. to meet it at the time of the certification of Exhibit A, the check for $2,450, on which the first eight counts of the indictment are based:

Q. What was your belief in regard to your right to certify a check as against that deposit?

This question was excluded by the court, and exception taken by the defence.

13. The circuit court erred in excluding the following evidence:

After Mr. Potter had been allowed to testify that he knew there was a deposit of Evans & Co. to meet them at the time of the certification of each of the Exhibits B, C, D, and E, which are the remaining checks covered by the indictment, counts 9 to 16 being devoted to Exhibit B,

counts 17 to 24 being devoted to Exhibit C, counts 25 to 32 being devoted to Exhibit D, and counts 33 to 40 being devoted to Exhibit E, the defence asked him the following question:

Q. Whether in each of these certifications it was your belief that you had a right to certify against that deposit?

This question was excluded by the court, and exception taken by the defence.

14. The circuit court erred in excluding the following evidence:

After the defendant had testified that there were deposits from day to day during the month of June and July, the defence asked the defendant, "What was your belief as to your right to certify checks as against daily deposits with the knowledge of the debit balance that stood in Evans & Co.'s account and the condition of his account on the books of the bank?"

Objected to by the Government, excluded by the court, and the defendant excepted.

15. The circuit court erred in excluding the following evidence:

The defence asked the defendant:

Q. Was there ever, prior to July 21, 1891, any talk between you and Mr. Evans as to his deposits and certification as they related to each other? Give the conversation.

Objected to by the Government, excluded by the court, and exception taken by the defendant.

This question was asked in connection with the offer previously made by the defendant and given in full in assignment number 8 and made part hereof.

16. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as to each and all of the counts of said indictment there is a variance between the allegation in each count that then and there, at the very moment of certification, the check was "of the following tenor," a copy of the check being given without any certification thereon and the check produced in evidence which show an alleged certification thereon.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

17. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That the words "then and there," in said indictment and each count thereof, are either used distributively, as meaning and relating two different periods of time, and that said indictment and each count thereof sets forth no offence against the laws of the United States, and that the same be quashed, or that said indictment and each count thereof sets forth the checks set forth therein as both certified and uncertified at the same moment of time, as co-existent with each other, and each count is bad for repugnancy.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

18. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to the creation of a valid certification by the Maverick National Bank of Boston, the vote of said bank required, as an integral part of said certification, countersigning by the paying teller, and that the alleged certifications, as set forth in the indictment and each count thereof, do not set forth any countersigning by the paying teller, and that as a matter of law neither the indictment nor any count thereof sets forth a valid certification by the president of the bank.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

19. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party with notice of the same, the vote of said bank required as an integral part of said certification the countersigning by the teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamped words "—— ——, paying teller;" that the said words, "—— ——, paying teller," stamped upon each check, would affect any holder of said check with notice of said vote and requirement; that there is a variance between the allegation in each count that the certification was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote that such countersigning was a prerequisite of valid certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

20. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to the creation of a valid certification by the Maverick National Bank of Boston, the vote and custom of the bank required as an integral part of said certification the countersigning of the paying teller, and that the alleged certification, as set forth in the indictment and each count thereof, did not set forth any countersigning by the paying teller; that as a matter

of law neither the indictment nor any count thereof sets forth a valid certification by the president of the bank.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

21. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party with notice of the same, the vote and custom of said bank required as an integral part of said certification the countersigning by the paying teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamped the words "—— ——, paying teller;" that the said words, "—— ——, paying teller," stamped upon each check, would affect any holder of said check with notice of said vote and custom of the bank and requirement; that there is a variance between the allegation in each count that the certification was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote and custom of the bank that such countersigning was a prerequisite of valid certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

22. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That neither of the counts of the indictment sets forth any offence against the laws of the United States, in that each count simply alleges a certification by writing, putting,

and placing certain words upon a check, and fails to allege delivery of the certification by the bank or the communication of that writing in any way, shape, or manner to any person, and that such delivery or communication is an essential element of the act of certification, and the failure to allege the same renders each count so far defective that it sets forth no offence against the laws of the United States.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

23. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that an overdraft is to be treated between the parties as a loan and interest is charged upon the same, and the deposit is then made in the bank by the depositor to his account, and the said deposit is entered to the credit of the depositor upon the books of the bank, the officers of said bank may lawfully certify checks drawn by the depositor, not exceeding in amount the amount of such deposit, prior to the withdrawal of said deposit by the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

24. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement was made between a bank and its depositor that an overdraft is to be treated between the parties as a loan and interest is charged upon the same, and the account of the depositor is balanced at the end of each day, which balance shows the state of the account at the morning of the next day, and a deposit is then made on such day by said depositor to his account, and the said deposit is entered to the credit of the depositor upon the books of the bank, the officers of the said bank may lawfully

certify upon such day checks drawn by the depositor not exceeding in amount the amount of such deposit prior to the withdrawal of said deposit by the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

25. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and he shall pay interest thereon, and the depositor in pursuance of the agreement overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

26. The circuit court erred in refusing to instruct the jury as follows as requested by the defendant:

That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor, and if the depositor's account is balanced at the end of the day, which balance shows the amount of the overdraft loan at the beginning of the next day, and if during such day a deposit is made by the depositor in the bank to the credit of his account, entered upon the books of the bank to the credit of the depositor, until the same has been withdrawn by drafts against it, such deposit may

be lawfully applied by the bank to the certification of the depositor's checks.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

27. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where a deposit is made by a dealer whose account is overdrawn by agreement with the bank that he may overdraw not exceeding a limit of $200,000, and that interest may be charged upon such overdraft, and after such deposit is made and entered to the credit of the dealer, and before the same has been drawn out by the dealer, a request from such dealer to certify checks to an amount equal to or less than the amount of such deposit, and the certification of the same, is an application both by the dealer and by the bank of the deposit to the check certified.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

28. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where a dealer's account is overdrawn by agreement with the bank that he may overdraw not exceeding a limit of $200,000, and that interest may be charged upon such overdraft, and the dealer's account is balanced at the end of the day, which balance constitutes the balance at the beginning of the next day, and during such day a deposit is made by the dealer and entered to the credit of the dealer, and after such deposit is made and entered, and before the same has been drawn out by the dealer, a request from such dealer to certify checks to an amount equal to or less than the amount of such deposit, and the certification of the same, is an application both by the dealer and by the bank of the deposit to the checks certified.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

29. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That where an agreement is made between a bank and its depositor that he may at any time overdraw his account prior to the revocation of such agreement by the bank, such overdraft not to exceed $200,000, and shall pay interest thereon, and the depositor, in pursuance of the agreement, overdraws his account, and interest is charged thereon, the transaction constitutes a loan by the bank to the depositor, and a deposit then made to the account of the dealer, which is entered up to the credit of the dealer upon the books of the bank, and against which deposit and with reference to which deposit a check or checks for an amount equal to or less than the amount of such deposit are certified by the president of the bank, all being done in the regular course of business, the assumed facts exclude any criminal intent on the part of the president.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

30. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The above facts assumed in the last request exclude any violation of the statute by the president in making such certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

31. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That the entry by a depositor, made upon a deposit slip which is handed to the bank by the dealer with an accompanying deposit, and received and held by the bank as

such, and is preserved among the papers of the bank, and which is used in the bank to make other entries on the books of the bank, becomes by delivery to the bank an entry upon the books of the bank to the credit of the dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

32. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That the entry of deposit upon a prepared block or memorandum paper, called in this evidence Schedule of Balances, kept by the bank in the department of the cashier to the credit of the dealer, in the regular course of business, is an entry regularly made upon the books of the bank to the credit of the dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

33. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a bank has allowed a dealer to overdraw his account by express agreement between the bank and the dealer that the said dealer may overdraw his account at any time, until notified to the contrary, to an amount not exceeding $200,000, that the transaction shall constitute a loan, and that interest shall be paid upon the same, and the account is balanced at the end of the day, which balance is the balance at the beginning of the next day, and when deposits are subsequently made on said last-named day by the said dealer and entered to his credit upon the books of the bank, and the president of the bank certifies the checks of the dealer upon said last-named day to an amount not exceeding the deposits so made on that day, honestly believing that he has a legal right to do the same,

that the above facts exclude any criminal intent upon the part of the president in making the said certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

34. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last request, any wilful violation of the statute by the president in making such certification is excluded.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

35. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when deposits are made in a bank by a dealer and the same are regularly entered to the credit of a dealer upon the books of the bank, and the president of the bank, honestly believing he has a legal right so to do, certifies checks of the dealer to an amount not exceeding the deposits of the dealer on said day, before the said dealer has otherwise specially withdrawn the said deposits, then the above facts exclude any criminal intent upon the part of the president in making such certifications.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

36. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last request, any wilful violation of the statute by the president in making such certification is excluded.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

37. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when in the regular course of business it is the duty and practice of a particular clerk of the bank, such clerk being a suitable and proper person and properly qualified for the performance of his duties, when a check of a dealer is presented for certification to the bank, to examine the account of the dealer to see whether the dealer has on deposit, entered to his credit upon the books of the bank, such an amount as will legally authorize the officers of the bank to certify such check, and when it is the duty of the clerk in the regular course of business, after such examination of the dealer's account and after having satisfied himself of the existence of such facts, to present the check for certification, first, to the assistant cashier, if he be present in the bank; second, to the cashier, if the assistant cashier is absent, and, third, to the president, if both of the cashiers are absent, and the president thereupon, relying that the clerk has done his duty, certifies the said check when brought to him by the clerk, said president not personally knowing what deposits have been made that day by the dealer and regularly entered to the credit of the dealer upon the books of the bank other than by the due course of business, that the above facts exclude any criminal intent upon the part of the president in making such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

38. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last request as true, they exclude any wilful violation of the statute on the part of the president in making such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

39. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a debit balance appears on the dealer's account on the books of the bank at the beginning of a day, and during the day deposits are entered to the credit of the dealer upon the books of the bank, and during the day and prior to any balancing of the dealer's account and prior to any withdrawal of the same by the dealer, checks are certified by the president of a bank, in reliance upon such deposits, to an amount not exceeding the amount of such deposits, which checks when certified are charged against the dealer's account, the certification of such check is an application by the bank of the deposit to such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

40. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a debit balance appears on the dealer's account on the books of the bank at the beginning of a day, and during the day deposits are made by the dealer and the same are not withdrawn by the dealer, and, prior to any balancing of the dealer's account for that day, the dealer has on deposit with the association an amount of money equal to the amount of said deposits, and the officers of the bank are legally authorized to certify checks drawn by the said dealer to an amount equal to the amount of such deposits.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

41. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when an agreement exists between the bank and dealer that an overdraft shall be a loan, and that the dealer

may overdraw his account up to a certain limit, and interest shall be charged upon the same, and in pursuance of such an agreement the dealer overdraws his account not exceeding the said limit, and while such overdraft exists, pursuant to such agreement, deposits are made by the dealer and are not withdrawn by the dealer, the dealer has on deposit with the association an amount of money equal to the amount of the said deposits, and the officers of the bank are legally authorized to certify checks drawn by the said dealer to an amount not exceeding the amount of such deposits.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

42. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when an agreement exists between the bank and a dealer that an overdraft shall be a loan, and that the dealer may overdraw his account up to a certain limit, and interest shall be charged upon the same, and in pursuance of such an agreement the dealer overdraws his account and his account is balanced to determine the amount of overdraft at the end of each day's business, and while such overdraft exists, pursuant to such agreement, deposits are made during the day by the dealer, and before the same are withdrawn by the dealer the president of the bank, believing that the dealer has on deposit with the said association the amount of such deposits, and that he is lawfully authorized to certify the checks of the dealer to an amount not exceeding the amount of such deposits, does certify the checks of the dealer to an amount not exceeding the amount of such deposits, the above facts negative any criminal intent upon the part of the president in certifying the said checks of said dealer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

43. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last paragraph, they negative any wilful violation of the statute by the president.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

44. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That when a debit balance appears on the dealer's account on the books of the bank at the beginning of the day, upon which interest is charged, and the account is not balanced until the end of the day upon the books of the bank, and during the day deposits are made by the dealer, and the president honestly believes that the depositor has on deposit with said association the amount of such deposit, and that he has a lawful right to certify checks of the dealer to an amount not exceeding the amount of such deposit and does so certify such checks, the above facts negative any criminal intent upon the part of the president in such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

45. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last paragraph, they negative any wilful violation of the statute by the president in such certification.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

46. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether the facts exist which shall lawfully authorize the certification of a check before bringing the check to an officer of the bank to certify, and such check is so brought to the officer by the clerk for certification, the certifying officer has a right to rely that the clerk has done his duty in the premises, and to certify the said check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

47. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The existence of the facts stated in the last request negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

48. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The existence of the facts stated in the last request negatives any wilful violation of the statute by the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

49. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether all the facts exist which shall lawfully authorize the certification of a check before bringing the check to an officer of the bank to certify, and the certifying officer knows that the account

of the dealer has been overdrawn by agreement that such overdraft be a loan, and knows that deposits have been made by the dealer on the day in question, but is ignorant whether the amount of the deposits exceed the amount of the overdraft and the check at the particular moment the check is brought to him, the certifying officer has a right to rely that the clerk has done his duty in the premises, and to certify the said check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

50. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

51. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any wilful violation of the statute by the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

52. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Where it is the duty of a clerk, such clerk being a suitable and proper person and properly qualified for the performance of his duties, to ascertain whether all the facts exist which shall legally authorize the certification of a check before bringing the check to an officer of the bank to certify, and the certifying officer knows that in June and sometimes in July an overdraft has existed in the amount

of the dealer, and knows that deposits have been made by the dealer, but is ignorant whether the deposits on July 23, 24, and 25, at the moment any check is brought to him, exceed the amount of the overdraft and the check, he has a right to rely that the clerk has done his duty, and to certify the check.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

53. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any criminal intent upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

54. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negative any wilful violation of the statute upon the part of the certifying officer.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

55. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

That if the defendant believed he had right to certify against deposits of the day when an agreed overdraft existed, this belief negatived any criminal intent.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

56. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

Assuming the facts stated in the last-named request, they negatived wilful violation of the statute.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

57. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The word "wilfully" in this indictment means not simply that the defendant certified the checks in question "voluntarily," but that he did it with a bad purpose or with an evil intent, and in this case must be construed to imply an intended design to certify the checks in question or some one of them when he had no lawful right so to do.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

58. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The question whether the bank made an application of the daily deposits to the debit balances or otherwise is a question of fact for the jury.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

59. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

The law will not apply payments according to the presumed interest of the parties, except where an application has been made —

1st. By the debtor;

2nd. By the creditor; or,

3d. By agreement between the debtor and the creditor.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

60. The circuit court erred in refusing to instruct the jury as follows, as requested by the defendant:

It is lawful for a bank to permit a withdrawal of deposits

made by a depositor who owes the bank a demand and overdue debt.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

61. The circuit court erred in charging the jury as follows:

After the judge's charge was given, and before the jury retired, the defendant excepted to that portion of the judge's charge regarding the countersigning by the paying teller as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

That portion of the judge's charge excepted to on that point is as follows:

"The point is taken by the defendant that Mr. Potter had not power alone to certify checks; that in order to certify checks to bind the bank the signature of the paying teller was also necessary, or his initials. I will define that hereafter; but if you find such to have been the fact you will render a verdict of not guilty upon this entire indictment, because then there is or would be a variance in the proof. If you should find the facts to be as claimed by the defendant on this point, it is enough for me to say that for reasons touching the allegations of the indictment, as appearing in the light of the evidence in the case, you must render a verdict of not guilty upon this entire indictment.

"I ought to explain what is meant in this connection by the authority of the president to bind the bank by certification. In the first place, I have no reference to the obligations of the bank to a third person, who might innocently purchase or obtain a check certified by the president in ignorance of the by-laws or course of proceedings of the bank or of the actual authority which the president was by

the practice of the bank or the votes of the directors empowered to use; neither is it a question whether checks without the authentication of the paying teller would be good delivery at the clearing-house. Probably, if this by-law was posted at the clearing-house, checks not authenticated would not be good delivery. I don't know about that, and neither you nor I need trouble ourselves about that. What I mean is this, to state it as accurately as I can: If the president of this bank, according to the vote of the directors and the course of business of the bank, was not authorized to certify these checks, as between the bank and others knowing all the facts, without the authentication of the paying teller, so that as to persons who knew all the facts the certification would not bind the bank without the authentication of the paying teller, this indictment cannot be sustained, and you must find a verdict for the defendant. Now, upon that point the United States put in the vote of the directors, 'that the president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, provided the bank had any funds for the amount of said checks when the same are presented.' Here comes the clause which is so important in this case: 'All such checks when certified to be countersigned by the paying teller.' Now, gentlemen, if the case stood upon that vote alone, so that it was a pure question of law for the court to instruct you about, I should advise you that that vote was merely directory, and that the bank was bound by a certification, although the check got out without the authentication of the paying teller, and that the fact that the indictment does not allege with reference to the certification other than it does allege on this point, and the fact that the United States have not proved other than it has proved upon this point, would afford no defence to this

case. I instruct you that *prima facie* upon this vote such is the state of the law with reference to this case. But this is a criminal case, and I cannot take the facts from you, and you are entitled to bear in mind that any vote of the directors establishing a certain order of things upon this point or any other is controlled by the course of business at the bank, and must be practically construed in the light of the course of business at the bank; and if upon the proofs in this case altogether, taking this vote with the rest, you are not satisfied beyond a reasonable doubt that the president was authorized to bind the bank by his certification, you must find a verdict for the defendant upon the whole indictment. You are to consider in this connection whether the act of the paying teller, either as required by this vote or as practised in the ordinary course of business at the bank, was anything more than for the purpose of enabling him to keep a record of the checks that were certified in order that he might know the state of the accounts of customers of the bank, or whether it was for the purpose of uniting with the president in binding the bank by a joint certification, or by the joint act of him and the president. I can only say, gentlemen, that if unless you find in the practice of the bank something which, taken with this vote, leaves upon your mind a reasonable doubt upon this branch of the case, you must return a verdict for the defendant. In other words, the United States, taking this vote and what appears here concerning the course of business at the bank, and the other facts laid before you touching this matter must prove this part of the case, in connection with others, beyond a reasonable doubt."

62. The circuit court erred in charging the jury as follows:

After the judge's charge was given, and before the jury

retired, the defendant excepted to that portion of the judge's charge relating to the making of deposits and their *prima facie* absorption when entered into a single account as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill. That portion of the judge's charge excepted to on this point is as follows:

"Then comes the allegation that the said persons — that is, Irving A. Evans & Co. — 'did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of $2,450 in money.' Now, gentlemen, what I have to say to you touching that proposition comes down, I think, practically and substantially to one question. I ask you, first of all, gentlemen, to determine whether or not the overdrafts, so called, of Irving A. Evans & Co. on the morning of these days, the 23rd, 24th, and 25th days of July, and at the evening or close of the 23d or 24th, appeared on the books of the bank in the account, and in the same account in which the deposits and checks of Evans & Co. were usually credited and charged, and whether this account is the ordinary deposit account such as was kept with other depositors upon the books of the bank, making no distinction for this purpose between individual depositors and banks, although there must have been some separation, by carrying them upon separate books. Then, gentlemen, I ask you to determine whether or not the checks deposited by Evans & Co. on these days, or the other deposits made by them, went through the regular and usual course customary at that bank with checks deposited by customers, and whether they went or not finally

upon this account in which appear the overdrafts that I have spoken of, and I ask you further to determine whether or not this course of business at the bank was recognized by Evans & Co., and whether or not Evans & Co. permitted corresponding entries to be made upon their pass books daily. If you find those in the affirmative, then I say to you that the question under this statute is not what was agreed to be done, but what was done; and I say to you *prima facie* the deposits as they came in were in fact applied towards the liquidation of the overdraft which appeared each day at the commencement of business, and were thus absorbed; and that, as it is apparent and admitted that the entire amount of deposits was not equal to the overdraft with which the day commenced, you should consider that as a matter of fact there were no moneys on deposit at any portion of the 23d, 24th, or 25th of July against which checks could be certified. But, gentlemen, it is claimed upon the other side, notwithstanding the facts to which I have called your attention certain deposits were set aside for the purpose of meeting or covering checks that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks were so treated by the bank as to become themselves a deposit in some form, would not sustain a defence in this case. I instruct you that the setting aside of a check temporarily, or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it, would not meet the purpose of this statute unless it was made itself the basis or a part of a deposit; and I instruct you, gentlemen, that unless the defence can show or does show that as a matter of fact certain checks were set aside — not a matter of agreement, not that there was an agreement to do so — but unless they show to you that as a matter of fact certain

checks were set aside as a deposit, according to the proper course of business, and appearing on the books and papers of the bank, as against which checks might be certified, this proposition will not avail the defence."

63. The circuit court erred in charging the jury as follows:

The defendant excepted to that portion of the judge's charge regarding the burden of proof being on the defence to show that a separation or segregation of certain deposits was made to certify against, the defendant's contention being that the burden of proof was upon the Government to establish beyond a reasonable doubt every point essential to the proof of the case.

That portion of the judge's charge excepted to on this point is as follows:

"But, upon some reflection, I have come to the conclusion that notwithstanding Evans & Co. may have been overdrawn on the morning of any particular day and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain checks or other moneys and hold them for the purpose of covering the certified checks, that it would not be any violation of the letter or policy of the statute and would be a defence. But I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable to see in the case any evidence — I do not mean to say evidence of what was intended or agreed to be done, which is not essential to this case, but any evidence that as a matter of fact any of these checks deposited by Evans & Co. did not go into the general deposit account and were not absorbed the instant they passed into the bank. Upon this branch of the case I instruct you the burden of proof is on the defence — not proof beyond a reasonable doubt, but to

satisfy you by a preponderance of evidence. If the defence does satisfy you by the preponderance of evidence that there was a segregation in fact appearing upon or shown from the books and papers of the bank — a segregation, a setting apart of certain deposits sufficient to recover the certified checks and against which the checks were certified — it is a defence in this case."

64. The circuit court erred in charging the jury as follows: After the judge's charge was given, and before the jury retired, the defendant excepted to the following portion of the judge's charge as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

The portion excepted to is as follows: "On the other hand, the position taken by counsel for the United States is perfectly correct. This statute is a law for the regulation of banking business; its provisions are arbitrary, but are to be obeyed; and yet they are of that character that while the United States must prove knowledge and wilfulness, it is not necessary that the United States should prove that the defendant was guilty of a corrupt purpose, guilty of moral turpitude, guilty of fraudulent intent, or guilty of an injurious purpose, except so far as the word injurious is a technical word and implied in every unlawful act by force of law. A conviction of an offence under this statute does not imply that the defendant has been guilty of any of those things, although the penalty is so large that there may be no opportunity for considering such things upon hearing the facts pertinent when sentence is pronounced; but here there are no considerations of that character whatever. The offence under this statute may be committed under such circumstances as need not imply any of these things. Certainly it is not for the United States to prove them, and the

United States are perfectly right in saying that they are not bound to prove any of these corrupt purposes."

65. The circuit court erred in charging the jury as follows: After the judge's charge was given, and before the jury retired, the defendant excepted to the following portion of the judge's charge in view of the exclusion of evidence of belief heretofore recited and as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

That portion of the judge's charge excepted to on this point is as follows:

"And, gentlemen, I ought to add that while ignorance of the law is not an excuse, sometimes ignorance of fact based upon ignorance of the law is an excuse; and if in this particular case it is true, or should be found by you to be true, as claimed by the defence, that the defendant acted upon the belief that the law authorized him to certify checks against the morning deposits, and for that reason, when the question of certifying checks was before him, kept in mind only the morning deposits and was ignorant, for that reason, of the general condition of the accounts, that fact would have great weight — very great weight — upon the question of knowledge to which I call your attention."

66. The circuit court has erred in its judgment entered April 22, 1893, in said cause in sentencing the defendant, as neither the record nor the verdict of guilty severally rendered upon each of the following counts, 1, 3, 7, 9, 11, 15, 17, 19, 23, 25, 27, 31, 33, 35, 39, warranted or authorized the infliction of any sentence thereunder or constituted a valid conviction under the laws of the United States.

The record and bill of exceptions show that counts 1, 3,

and 7 were based upon and severally charged the unlawful certification of a single check, numbered 54493, dated Boston, July 23, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank, payable to the order of Hayward & Townsend, for the sum of $2,450.

As to these three counts the record and bill of exceptions show that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that the counts 9, 11, and 15 were based upon and severally charged the unlawful certification of a single check, numbered 54498, dated Boston, July 24, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank, payable to the order of the National Security Bank, for the sum of $25,000.

As to these three counts, the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three of them and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that counts 17, 19, and 23 were based upon and severally charged the unlawful certification of a single check, numbered 54499,

dated Boston, July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank, payable to the order of George C. Brooks & Co., for the sum of $275.

As to these three counts the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts, or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions show sthat counts 25, 27, 31 were based upon and severally charged the unlawful certification of a single check, numbered 54518, dated July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National Bank of Boston, payable to the order of the National Security bank, for the sum of $25,000.

As to these three counts the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

The record and bill of exceptions shows that counts 33, 35, and 39 were based upon and severally charged the unlawful certification of a single check, numbered 54519, dated Boston, July 25, 1891, drawn by Irving A. Evans & Co. upon the Maverick National bank, payable to the order of National Security bank, for the sum of $7,500.

As to these three counts the record and bill of exceptions shows that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts or all three and attempt to sentence thereunder or to inflict any sentence under said verdict.

BRIEF OF THE ARGUMENT.

I. DEFECTS IN THE INDICTMENT.

(a) The indictment is defective in that it fails to set forth any completion of the contract of certification or any delivery of said certification to any person whatever.

The first and twenty-second assignments of error, being based upon substantially the same grounds, will be discussed together.

The first assignment is as follows: —

Assignment 1. The Circuit Court has erred in overruling the demurrer to counts 1 to 40, inclusive, and in sustaining the validity of said counts, in that said counts and each of them are not sufficient in law and do not set out any offence under the laws of the United States, in that said counts and each of them set forth the certification of

a check simply by a writing upon said check, and fail to set forth any completion of the contract of certification, and fail to set forth any delivery of said certification to any person whatever, and fail to set forth the creation of any contract of certification or liability whatever of the said association upon said check. (Record, pp. 113, 168.)

Assignment 22, being request for ruling No. 9, is as follows: —

Assignment 22. The Circuit Court erred in refusing to instruct the jury as follows, as requested by the defendant: —

That neither of the counts of the indictment sets forth any offence against the laws of the United States, in that each count simply alleges a certification by writing, putting, and placing certain words upon a check, and fails to allege delivery of the certification by the bank, or the communication of that writing in any way, shape, or manner to any person, and that such delivery or communication is an essential element of the act of certification, and the failure to allege the same renders each count so far defective that it sets forth no offence against the laws of the United States.

The court refused to so instruct the jury, and the defendant excepted to such refusal. (Record, pp. 141, 176.)

Each of said counts charges the offence of certifying a check by writing certain words thereon. Each of said counts, however, fails to allege any delivery of said check by the bank to the party requesting the certification or the communication of that writing in any way, shape, or manner to any person.

Such delivery is necessary to complete the act of certification.

Morse on Banks & Banking, 3d ed. sec. 411.
Randolph on Commercial Paper, sec. 216.
Bolles, Banks and their Depositors, sec. 235.
Freund v. *Importers & Traders Nat'l Bank*, 76 N.Y. 355.
Freund v. *Importers & Traders Nat'l Bank*, 3 Hun, 689.

The law is laid down in Morse on Banks & Banking, sec. 411, as follows: —

"The bank's liability upon a certification does not arise from the mere marking the check good, but upon the delivery of the certified check to the holder or person who presents it."

Randolph, Commercial Paper, sec. 216, says, —

"But the certification of a check by a bank only takes effect when the certified check is redelivered to the holder, and if so delivered after notice to the bank of defence on the drawer's part, and the bank subsequently pays, it will do so at its own peril."

Bolles, Banks and their Depositors, sec. 235, says, —

"As a bank is not liable on a certified check until after delivery, so if, while having a certified check in its possession, drawn for the accommodation of the payee, and which without his endorsement is presented to the drawee bank and certified, but which the maker directs the bank not to pay, it cannot be legally

paid. If the bank should pay it, the maker's account cannot be charged with the amount."

"The evidence [in *Freund* v. *Importers & Traders Nat. Bank*, 3 Hun, 689, a case involving this principle, said Judge DANIELS, who delivered the opinion of the court] tended to show that the bank had merely certified but had not delivered its certificate when it was prohibited from paying the check. The certificate, in that condition, imposed no obligation or liability on the bank for the payment of the amount to the holders. A delivery, as well as the making of the certificate, was necessary to render the defendants liable upon it. Until that took place, the certificate was entirely subject to the defendant's control. It was not bound to deliver it at all, but it had the right to reconsider and erase it or otherwise remove it at any time before it passed out of the defendants' control by a delivery, and it became the defendants to do that when the notice was received forbidding payment of the check. It had then incurred no liability by means of its certificate, and it was not afterward at liberty to create it and charge the plaintiff's funds with the consequences of it."

Delivery is one of the essential requisites to the validity of commercial paper.

Thus it is a well-settled principle that delivery of a note is essential to the making of the same, and a condition precedent to liability upon the same.

So, in relation to the endorsement of a note, delivery of the endorsement is necessary to create liability upon such endorsement.

Daniel, Negotiable Instruments, 4th ed. § 665.

Mere writing the endorsement is not enough.

Mendenhall v. *Baylies*, 47 Ind. 575.
Byles on Bills, p. 150, and cases cited.

Like all other obligations on negotiable paper, the acceptance of a bill, which in its nature most clearly resembles the certification of a check, requires delivery for its completion. This was settled in England by the case of *Cox* v. *Troy*, 5 B. & Ald. 474; also in Massachusetts.

See *Dunavan* v. *Flynn*, 118 Mass. 537.

In this case the court, by GRAY, C.J., say (p. 539),—

> "Under these circumstances it was rightly held that the mere writing of the acceptance upon the bill, not communicated to the drawer or holder and the detention of the bill in the defendant's custody, did not bind him, or operate as a payment of his debt to the drawer."

In the former case it was held that an acceptance written on a bill of exchange might be cancelled subsequently before the delivery of the bill to the holder, and before any communication of the acceptance. BAILEY, J., said,—

> "I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor, for the making the communication is a pledge by him to the party, and enables the holder to act upon it; but while it remains in the drawee's hands, it seems to me the acceptance is not fully binding upon the person who signed it, and he is at liberty to say, before he parts with it, 'I have not yet entered into an engagement to accept.'"

The other members of the court express similar views. This doctrine is now the settled law of England by virtue of the Bills of Exchange Act passed in 1882, 45 & 46 Vict. c. 61, which purports to codify the then existing law of England, not to change it in any respect.

"21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

"Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the persons entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable."

This section of the Bills of Exchange Act covers also the case of certification of checks, for in a subsequent section of the Bills of Exchange Act it is enacted:

"73. A cheque is a bill of exchange, drawn on a banker, payable on demand.

"Except as otherwise provided in this part, the provisions of this act, applicable to a bill of exchange payable on demand, apply to a cheque."

The Bills of Exchange Act is given in convenient form in Chalmers, Bills of Exchange, 4th edition.

The allegation in the various counts of the indictment that the defendant "certified a check" is not broad enough to include the essential element of delivery, for it is specifically alleged in each count what the defendant did to constitute the certification, namely, "by then and there writing, placing, and putting in and upon and across the face of said check," and (in some counts) "as a certification thereof," "the words and figures following, that is to say," etc.; therefore no inference is presumable that he certified it in any other way, or that he did anything else

besides the acts referred to in the pleading. To test this, suppose a pleading read that a defendant accepted a bill by saying he would pay it in a jurisdiction where an acceptance is required to be in writing. Clearly, the pleading would be bad on demurrer, although if it had simply stated that the defendant accepted the bill it would be good. A question very similar to that presented here arose in *Cox* v. *Troy*, although there the question did not arise on the pleadings. The jury there had found that the defendant accepted the bill, but it appeared in evidence that the only way he accepted was by writing the acceptance across the face of the instrument without delivery. ABBOT, C.J., said, —

> "It is true that the jury have found that he did accept the bill, but, connecting that finding with the other facts of the case, it does not seem to me that it means more than that at one period the defendant, or some one in his behalf, did write an acceptance on it, and at any rate was minded to accept it."

No more than this can fairly be inferred from any of the counts in the present indictment.

The words "so certified as aforesaid," near the end of each count, do not help the pleader, as they refer simply to the act of writing upon the check.

These words "by then and there writing, placing, and putting on and upon and across the face of said check," and (in some counts) "as a certification thereof," "the words and figures following," etc., cannot be stricken out of the indictment, but must qualify and limit the allegation of certification.

They belong to that class of cases of particular description which are illustrated by the cases on variance.

It might not have been necessary to allege them, but when alleged, they must be proved as laid.

Com. v. *Stone*, 152 Mass. 498, and cases cited.

See, also, *Com.* v. *Lee*, 148 Mass. 8, which was a complaint for keeping and maintaining a "common nuisance; to wit, a building; to wit, a tenement in building," etc., for illegal sale of intoxicating liquor, where it was held that the commonwealth was confined to the proof of the offence as defined by the last specification, the word "building" being limited and cut down by the further allegation "tenement in building."

Applying this principle to the present case, the government would be limited to the proof of a certification by writing, placing, and putting certain words across the face of a check, which clearly cannot constitute a certification.

As no delivery, or completion of the contract of certification, is alleged, one of the essential elements of the offence is omitted, and the statutory offence of certification is not set out, and therefore no offence is charged.

The omission in the indictment of any fact or circumstance necessary to constitute the offence will be fatal.

Wharton's Crim. Pl. sec. 152.
United States v. *Cook*, 17 Wall. 174.
United States v. *Cruikshank*, 92 U.S. 542.
United States v. *Britton*, 107 U.S. 655, 665.

It is apparent that the statutes contemplate the delivery of the check as a part of the certification, for if there were no delivery there could be no loss to the association, and the object of the statute is presumably to prevent loss to the association.

The court below, in its opinion on this point, confuses the delivery of the check with the delivery of, or communication of, the certification.

The court says on this point, —

> "Moreover, there is nothing in this indictment, nor is there anything in the nature of the transaction of certifying a check, which raises any presumption of law that the check passes into the possession of the bank certifying it, and there is no occasion for an allegation of redelivery when neither the indictment alleges delivery nor the law implies it." (Record, p. 194.)

The defence makes no contention as to delivery or redelivery of the *check*, but does contend that there must be a delivery or communication of the *certification* to some person as an essential integral element of a certification, and that such delivery or communication thereof must be set out in the indictment as a specific, essential, integral fact.

The check is one contract; the certification of the check is an entirely different contract. One of the essential elements of the certification of the check is the delivery of or communication of that certification to the person with whom the contract of certification is made.

The court further adds, —

> "If it should appear in defence that the checks did actually pass into the possession of the bank, a different question might arise, and probably it would be a sufficient answer to the indictment that they were not redelivered." (Record, p. 194.)

Here is the same confusion in the mind of the court between the check and the certification of the check.

They represent two different and distinct contracts. The contract of certification, or rather one essential ingredient of it, to wit, the writing on the face of the check, is always in the possession of the bank until the contract of certification is completed by the addition of the other essential ingredient of this contract, to wit, the delivery of this writing or the communication of the same to the person with whom the contract of certification is made.

In the case at bar only one of the essential ingredients of the contract of certification is set forth, to wit, the defendant certified by writing, putting, and placing certain words on a check. The other essential ingredient to make up the contract of certification, to wit, the delivery or communication of that writing, is not alleged, and the lack of such allegation makes the indictment fatally defective.

(b) The allegation in each count, "amount of money equal to the amount specified," is bad as argumentative.

Assignment 2. The Circuit Court has erred in overruling said demurrers and sustaining said counts 1 to 40, inclusive, in that said counts and each of them are fatally defective in that the allegation, "amount of money equal to the amount specified," contained in each count, and forming a substantial averment thereof, is argumentative. (Record, pp. 113, 168, 169.)

The allegation, "amount of money equal to the amount specified," in the check, which is used in all the counts, is argumentative, and therefore bad.

Haven v. *The State*, 59 Vt. 399.

In this case it was alleged in the first count of the indictment that the respondent, as treasurer of a railroad company, did "sign, with intent that the same should be issued and used, a certain false and fraudulent certificate of the ownership of 1000 shares of the said capital stock of the aforesaid Rutland Railroad Company, falsely certifying and purporting that Dr. J. A. Mead was then and there the owner of 1000 shares of the said capital stock," etc.

> "When, in fact, the said Dr. J. A. Mead did not own, nor have standing in his name, *any* share or shares of the said capital stock of said railroad company, nor was he, the said Dr. J. A. Mead, entitled to any share or shares of the said capital stock."

The opinion of the court was delivered by ROWELL, J.:

> "The first and the fifth counts are bad for argumentativeness. They allege that Mead did not own, nor have standing in his name, and was not entitled to, *any* share or shares of the capital stock of said company; which is but an argumentative way of saying that he did not own, and was not entitled to, *the* shares of stock purporting to be conveyed to him by said certificate."

And the court cites —

Bourne v. *Taylor*, 10 East. 189,

and says, —

> "So, too, if, in trespass for carrying away goods, the defendant should plead that the defendant never had any goods, that would be argumentatively saying not guilty, and so no plea, although the argument would be infallible."

Citing —

Dyer, 43a.
Steph. Pl. 385.

So, in the present case:

There might have been a larger amount on deposit than the amount of the check, and yet the allegation as made would be strictly true, but in that event clearly no offence would have been committed. The allegations then might in this respect all be true and no offence committed. Such pleading is bad for argumentativeness. The language used is, to be sure, the language of the statute, but it is not enough to use the words of the statute when such words are indefinite or general.

United States v. *Cruikshank*, 92 U.S. 542, 558.
Com. v. *Bean*, 11 Cush. 414.
(s.c.) 2 Leading Criminal Cases, 173, and cases cited.

In this case, a statute read that every person who "shall maliciously or wantonly break the glass or any part of it in any building not his own," etc., shall be punished.

The indictment averred that the defendant "with force and arms, wilfully, maliciously, wantonly, and without cause, did break and destroy the glass, to wit, two panes of glass, of the value of ten cents each, in a certain building there situate, not his own," etc. After a verdict of guilty, the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own.

METCALF, J., delivered the opinion:

"It is admitted by the counsel for the commonwealth that the section of the statute on which this indictment is framed was intended to punish the malicious and wanton breaking of glass which is part of a building. And it is argued by him that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in a statute may be, and not unfrequently must be, ascertained by examination of the context. In the present case it is from the context that the words 'glass in a building' are understood on all hands to mean glass which is part of a building. But the court, in ascertaining the offence with which the defendant is charged, cannot look beyond the words of the indictment itself. If those words do not sufficiently charge the offence which the statute was meant to punish, the indictment is fatally defective.

2 Hawkins, P.C. ch. 25, sec. 111.
Com. v. *Slack*, 19 Pick. 304.
Com. v. *Clifford*, 8 Cush. 215.
Com. v. *Stout*, 7 B. Mun. (Ky.) 247.

We are therefore of opinion that the indictment in this case will not sustain a judgment against the defendant. For aught that the indictment shows, the glass which he is charged with having maliciously and wantonly broken may have been panes of glass which were not any part of any building."

So, in the present statute, the statute undoubtedly from the context intends to prohibit certification when there is

not on deposit the amount named in the check certified; but the court cannot say, from the words of the indictment, that there was not on deposit a much larger amount than that of the check certified, in which event clearly no crime is set forth in the indictment.

(c) Certain counts should allege the money was not on deposit at the time the paying teller authenticated the check.

Assignment 3. The Circuit Court has erred in overruling said demurrers and sustaining counts 1, 2, 9, 10, 17, 18, 25, 26, 33, 34, in that said counts and each of them are defective in that they fail to allege that the money was not on deposit at the time the paying teller authenticated the check specified in each of said counts. (Record, pp. 113, 169.)

In counts 1 and 2, 9 and 10, 17 and 18, etc., and in two out of the eight counts made on each check throughout the indictment, where it is charged that the check was authenticated by one Jordan, the paying teller, or by one Aldrich, acting paying teller, it is apparent that the certification was not complete under any view of the case till such authentication by Jordan.

It is alleged in these counts that the drawer of the check did not, at the time the check was so certified (that is, written upon) by Potter, have on deposit with said association an amount equal to the amount specified in said check; but there is no allegation that the money was not on deposit at the time Jordan or Aldrich authenticated the check.

If the money was then on deposit, it is submitted that no offence is set forth, and if it was not then on deposit an averment covering this fact is required in the indictment.

II. VARIANCES BETWEEN THE INDICTMENT AND THE PROOF.

(a) Under the vote of the directors, the countersigning by the paying teller is an integral part of the certification of any check by the Maverick National Bank, and there is a variance between the allegation of certification in the indictment and the proof under this vote.

Assignments of error numbers 4, 18, 19, 20, and 21, will be considered together, and are as follows: —

Assignment No. 4. The Circuit Court has erred in admitting in evidence the certifications upon Exhibits A, B, C, D, and E, the checks the certifications of which are complained of in the indictment, to be read to the jury, inasmuch as there was a variance as a matter of law between the allegation in each count of the indictment, that the defendant certified the said checks by writing, putting, and placing thereon the words and figures following: —

"Maverick National Bank
"Certified
"Jul. 23 1891
"Pay only through the Clearing House.
"A. P. Potter P
—— —— Paying Teller."

and the evidence that the checks in question were certified under the following vote of the bank: —

> "Voted: That the President, Cashier or Assistant Cashier be authorized to certify any checks drawn on this bank providing the Bank is in funds for amount of said checks when the same are presented: all such checks when certified to be countersigned by Paying Teller.
>
> "A. P. POTTER, P.
>
> "Attest: J. W. WORK, C."

And the evidence that, according to the custom of the bank, the paying teller countersigned each certification and each certification offered in evidence, showing, as a matter of fact, the initials A. C. J. of the paying teller upon the certification stamp opposite the words "Paying Teller," written upon the same by the paying teller, A. C. Jordan, the defendant claiming that, as matter of law, under the vote of the directors and the custom of the bank, the initials of the paying teller as his signature in countersigning the certification was an integral and essential part of the certification, and which was not set forth at all as such in the 1st, 2d, 3d, 4th, 7th, and 8th counts of the indictment in each set of eight counts (there being eight counts devoted to each check), and which is set forth in the 5th and 6th counts of each set of eight counts only as being made by the accused, while the evidence showed that the countersigning was done by the paying teller, A. C. Jordan.

The defendant claimed a variance existed as to the counts which rendered the proffered evidence inadmissible, and that the variance appears as matter of law. (Record, p. 169.)

Assignment No. 18, request 5, requests a general ruling

that the above vote of the bank required as an integral part of said certification the countersigning by the paying teller, and this countersigning, not being set forth by any count of the indictment, renders each count bad. (Record, pp. 140, 175.)

Assignment No. 19, request 6, is as follows: —

> "19. The Circuit Court erred in refusing to instruct the jury as follows, as requested by the defendant: —
>
> "That, as a matter of law, as a prerequisite to a valid certification by the Maverick National Bank of Boston binding upon said bank in the hands of a party, with notice of the same, the vote of said bank required, as an integral part of said certification, the countersigning by the teller; that the certification set forth in each count of the indictment sets forth the certification merely by writing, putting, and placing certain words upon said check, not including countersigning by the paying teller, but having upon the certification stamp words 'Paying Teller;' that the said words 'Paying Teller,' stamped upon each check, would affect any holder of said check with notice of said vote and requirement; that there is a variance between the allegation in each count; that the certification was by writing, putting, and placing certain words upon checks in question, not including said countersigning by the paying teller, and the evidence by the vote that such countersigning was a prerequisite of valid certification."

The court refused to so instruct the jury, and the defendant excepted to such refusal. (Record, pp. 140, 175.)

Assignment No. 20, request 7, is the same as No. 18, except that the words "and custom" are added to the

words "the vote of the bank required, as an integral part of the certification, the countersigning by the paying teller." (Record, pp. 140, 175.)

Assignment No. 21, request 8, is the same as 19, except that the words "and custom" are added in the third line after the word "vote," and the words "and custom of the bank" are added in the twelfth and sixteenth lines after the word "vote." (Record, pp. 141, 176.)

Under the vote of the directors providing for the certification of checks by the officials of the Maverick National Bank, the countersigning of such a check is an integral part of the certification of any such check certified by the Maverick National Bank of Boston, and the indictment is bad in not alleging such countersigning as part of such certification, there being a variance between the indictment, which alleges certification by writing, etc., certain words, and the proof, requiring authentication by the paying teller.

I. The bank had the right to determine the form of its certifications.

It is unnecessary to consider here the question of what might be held to be a certification, in the absence of express and explicit provisions and limitations by the Maverick National Bank of what should constitute a certification of a check of that bank. For the purposes of this argument it may be admitted that, unless his authority be limited and controlled by by-law or vote, a cashier, by power inherent in his office, or a teller, may certify checks in any form that unmistakably indicates the assumption of liability of the bank.

The Supreme Court has laid down, in a most carefully argued opinion, delivered by Mr. Justice SWAYNE, that the directors of any bank may limit the authority of the cashier or other officer as they deem proper, and such limitation of authority would be good and binding upon those who had notice of such limitation. The exact words of the Supreme Court in *Merchants Bank* v. *State Bank*, 10 Wall. 650, are, —

> "A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown."

In the absence of such limitation and provisions of a bank as to who shall be the certifying officer, some courts hold the cashier and some the teller to be the proper certifying officer.

Irving Bank v. *Wetherald*, 36 N.Y. 335.

The practice of the banks also differs. In some banks the cashier's department, in some the paying teller's department, are constituted the certifying officers.

The Maverick National Bank, in the discretion of its directors, on November 1, 1886, saw fit to prescribe that both the cashier's department and the paying teller's department should take part in the certification of every check drawn upon that bank, and such provisions and limitations are binding upon all to whom such limitations are known. The vote of the directors is as follows: —

> "Voted. That the President, Cashier or Assistant

Cashier be authorized to certify any check drawn on this bank, providing the bank is in funds for amount of said checks when the same are presented, all such checks when certified to be countersigned by paying teller."

The government offers the following as a certification by the president of a check drawn on the Maverick National Bank, taken from the first count, which may serve as a sample: —

"Maverick National Bank
"Certified
"Jul. 23, 1891
"Payable only through Clearing House
"A. P. Potter P.
—— —— Paying Teller."

the words "A. P. Potter P." being written and the rest being in the form of a stamp. The defence claims that such a stamp, with the written words "A. P. Potter P." and the signature of the paying teller left blank, does not constitute a certification by the Maverick National Bank of Boston, and in the hands of a holder even for value would create no liability whatever against the Maverick National Bank, for the following reasons: —

2. The vote of the directors required as a part of the certification the countersigning by the paying teller.

The question may arise between the officer and the bank, or between the bank and third parties.

Morse, Banks & Banking, 3d ed., vol. i; §. 155*g*. says:

> "A bank which allows an officer to certify checks, can of course impose upon his authority any restrictions it may choose. As usual, these restrictions will always be valid as between the officer and the bank, but if it should be decided that the power of certification is inherent in any special officer, or if local usage should be such that he is to be regarded as held out to the world as possessing the general power of certification subject to no unusual limitation, notice of the existence of such restrictions must be brought home to the knowledge of any third persons who are to be affected by them."

The following American cases are directly in point, on the question of countersigning that in similar cases such countersigning is absolutely essential to make an act or deed valid: —

Badger v. *American Popular Asce. Co.*, 103 Mass. 244.
Lynn v. *Burgoyne*, 13 B. Mun. (Ky.) 400.
Galloway v. *Hamilton*, 68 Wis. 651.
Maas v. *M. K. & T. Ry. Co.*, 83 N.Y. 223.

The English cases on this proposition are numerous, but the following cases may be offered as samples: —

In re General Provident Assurance Company, 38 L.J. Ch. 320.
Hibbert v. *Barton*, 10 M. & W. 678, 680.

This proposition is also established by the following cases: —

Twiss v. *Port Huron*, 63 Mich. 532.
Whitney v. *Port Huron*, 88 Mich. 273.
Bowditch v. *Boston*, 101 U.S. 16.

In *Badger* v. *American Assurance Company*, *supra*, where a policy of insurance contained a provision that it should not be enforced till countersigned by A. F. Badger, agent at Boston, the Massachusetts Supreme Court said, —

> "We need not inquire into the motive of the company for inserting this condition, nor into his motive for neglecting to comply with it. It is sufficient that the defendants had a right to insert it and to insist upon it."

Lynn v. *Burgoyne*, *supra*, is a similar case, requiring countersigning of an insurance policy.

Galloway v. *Hamilton*, *supra*, is under a Wisconsin statute, par. 2216, Rev. Sts., providing that conveyances by corporations "shall be signed by the president or other authorized officers of the corporation, sealed with the corporate seal, and *countersigned by the secretary or clerk thereof*." The deed was signed and sealed by the president, but was not countersigned. Chief Justice COLE said in the opinion, referring to the countersigning by the secretary, —

> "This provision is controlling, and shows that there was no proper execution of the deed . . . for we suppose, where a general law provides as to the mode in which a deed of a corporation conveying its real estate shall be executed, this mode must be adopted in order to its validity as a corporate act."

Maas v. *M. K. & T. Ry. Company*, *supra*, is a case

where a railroad bond contained a provision that it should not be valid till authenticated by a certificate endorsed thereon, signed by a trustee. Judge DANFORTH says in the opinion (p. 228), —

> "The argument of the learned counsel for the appellant was ingenious but not sufficient to overcome the conceded facts that upon the face of each instrument was written a declaration that 'this bond shall not become obligatory until it shall have been authenticated by a certificate indorsed thereon, duly signed by the trustee aforesaid,' and that those in question are not so authenticated. No argument can make the case plainer, for it cannot be denied that the Tebo and Neosho Railroad Company, when arranging the terms of a proposed contract, had an unqualified right to determine upon what condition their liability should depend, nor that a person accepting the contract with notice of the condition would be bound thereby."

It was argued that the bonds were good bonds against the company at any rate, as they were signed by the president and treasurer. The judge says, —

> "Such a construction is opposed to the plain language of the condition, and cannot be adopted. . . . The act of the trustee when performed was only to authenticate, that is, 'to determine as real and true.' Until performed, the bonds rested in 'supposition:' when performed, its effect was to render them obligatory and pronounce them genuine. As it had not been performed, the bonds were not complete, and have not become the contract of the railroad company."

The English case *In re General Company*, *supra*, is a typical one under the English law. The articles of the company required special formalities to effect a valid mortgage, — resolution of board, seal of company, signature of two directors, countersigned by secretary.

MALINS, V.C., holding that all these formalities were necessary, says (p. 321), —

> "But this is a public company, and nothing is more clearly settled than that they can only bind themselves in the manner described and permitted by law."

It is to be borne in mind that the contract of certification, like the endorsement of a check, does not purport to set forth in so many words the contract created by it, but the contract is gathered from the words used, and it is submitted that the limitation of the directors, providing for countersigning by the paying teller, means and is to be construed exactly as if the certification contained the express words, "This shall not be valid until it is countersigned by the paying teller."

3. No party could take a check having on its face the certification set forth by the government without being affected with knowledge of the vote of the bank and without being put on his inquiry.

The certification as offered is prominently stamped upon the check as follows: —

"Maverick National Bank
"Certified Jul. 23, 1891

"Pay only through Clearing House
"A. P. Potter, P.
—— —— Paying Teller."

Potter's signature being written, the signature of the paying teller being left in blank unsigned, is notice to all the world that one of the two signatures required by the Maverick National Bank to make a good certification is lacking, and is called for by the stamp, and puts the holder at once on his inquiry. Cases where a signature of an officer of a corporation is lacking, and where a blank is left before the title of the officer, counsel have been unable to find, which may be explained by the fact that no one would be so foolish as to accept such a manifestly incom pleted instrument. That such a case would affect any party who might take the same with knowledge of the requirement of such signature, and of any by-law or vote in relation to the same, is clear upon the authority.

Where a blank has been left in the place of payment in a bond, parties taking the same have been held not to be *bona fide* holders, and to have been put on their inquiry by such blank.

Parsons v. *Jackson*, 99 U.S. 434.
Jackson v. *Vicksburg R.R. Co.*, 2 Woods, 141.
Ledwich v. *McKim*, 53 N.Y. 307.

The English law on blanks in instrument is set forth in *France* v. *Clark*, L.R. 26 Ch. Div. 257. Where the irregularity is one which appears on the face of the instrument, the purchaser is bound to take notice of it.

Royal British Bank v. *Durquand*, 6 E. & B. 330.
In re Athenæum Society, 4 K. & J. 560.

The general proposition of constructive notice arising from facts appearing on the face of certificate, or any irregularities apparent upon the face of the same, is well illustrated by the following leading cases, where it has been held that trustees could not pledge trust stock for their own private debt, and the pledgee has been held affected with notice of the terms of the trust by the word "Trustee" appearing on the certificate: —

Shaw v. *Spencer*, 100 Mass. 382.
Duncan v. *Jaudon*, 15 Wall. 165.

This very question of notice of illegality affecting the certification itself in connection with the date of the instrument, has arisen in a case upon a certified check in New York:

Pope v. *Bank of Albion*, 57 N.Y. 127.

In this case the check was dated March 1, 1866, but was drawn in February, 1866, and on the face was written, "Accepted A. J. Chester A. cash."

C, who wrote this, did it without authority in violation of duty. The check was cashed by the plaintiff on March 2, 1866, in New York city without notice of defects save what appeared on its face. It appeared in evidence that the check could not have reached New York in the ordinary course of business at the time it was cashed. *Held*, that the plaintiff was not a *bona fide* holder for value, as the acceptance appeared to be by a subordinate officer whose authority must be shown, or facts estopping defendant from denying, and that the fact that the check, if accepted at date, could not have reached New York at the time when cashed, was sufficient to put the plaintiff on inquiry.

It is submitted, therefore, on these cases, that the stamp set forth by the government as the certification, with the blank for signature by the paying teller, would affect any holder with notice of the vote of the directors, and that no liability to the bank could accrue from such a certification.

4. If the court holds that the proposition of the defendant is established, that countersigning by the paying teller is an integral part of the certification, and that no liability could accrue against the corporation without his countersigning, then the defendant claims that all of the counts of the indictment are bad.

First. In counts 3, 4, 7, and 8 of each set of counts upon each check in the certification, the signature of the paying teller is left blank, the initials A. C. J. are not inserted, and there is no pretence of stating the same; and these counts are therefore bad.

Second. In counts 1 and 2 of each set of counts the initials A. C. J. are not set forth as a part of certification, but there is an allegation that Jordan authenticated the certification by adding the letters A. C. J.

The Circuit Court, in its first opinion upon this indictment, says, with reference to counts 1 and 2, —

> "Touching the matter of authentication of the paying teller, it may appear at the trial that the certification was not complete without that authentication, and in that event the result may be that the United States

> will fail to prove its case or the defence will show a variance. The counts expressly alleged the certification to have been accomplished, and as they do not set out the purpose of the authentication, it cannot be presumed to be any part of the certification. The word 'authenticate,' like the word 'attest,' has not a sufficiently definite signification to control the positive allegation contained in these counts." (Record, p. 195.)

As, therefore, the countersigning was not set forth as part of the certification, these counts are bad.

Third. As to counts 5 and 6 in each set of counts, the certification shows the letters A. C. J. as part of the certification, but they are alleged to have been put on by the defendant, and the proof is that they were put on by Jordan, who was specially deputed by the vote of the directors to do this. On these two counts, therefore, the defendant cannot be held on account of variance.

For purposes of convenience, the plaintiff in error has discussed this question as if the whole indictment were before the court. It should be borne in mind, however, that the plaintiff in error was convicted only on the 1st, 3d, and 7th counts of each of the five sets of eight counts. (Record, p. 167.)

(b) The indictment shows the check as both certified and uncertified at the same time, and there is a variance between the check as produced with the certification thereon, and the allegation that, co-existent with such certification, the check was uncertified.

Assignments 16 and 17 will be considered together. Assignment 16 is as follows: —

Assignment 16, request 3. The Circuit Court erred in refusing to instruct the jury as follows, as requested by the defendant: —

That as to each and all of the counts of said indictment, there is a variance between the allegation in each count that then and there, at the very moment of certification, the check was "of the following tenor," a copy of the check being given without any certification thereon, and the check produced in evidence, which shows an alleged certification thereon. The court refused to so instruct the jury, and the defendant excepted to such refusal. (Record, pp. 139, 140, 174.)

Assignment 17 is as follows: —

Assignment 17. The Circuit Court erred in refusing to instruct the jury as follows, as requested by the defendant:—

That the words "then and there" in said indictment, and each count thereof, are either used distributively as meaning and relating to two different periods of time, and that said indictment and each count thereof sets forth no offence against the laws of the United States, and that the same be quashed; or that the said indictment and each count thereof sets forth the check set forth therein as both certified and uncertified at the same moment of time as co-existent with each other, and each count is bad for repugnancy.

The court refused to so instruct the jury, and the defendant excepted to such refusal. (Record, pp. 140, 175.)

The check, as produced at the trial with the certification upon the same, shows a variance between the allegation in each count that, co-existent with the certification, it was of "the following tenor," that is, without a certification.

As a matter of criminal pleading, "the words 'then and

there' are relative, and refer to some foregone averment, and their effect must be determined by that allegation to which they refer. If that is a single act done, and it there avers that 'then and there' another fact occurred, *it necessarily imports that the two were precisely co-existent*, and the word 'then' refers to a precise time."

Heard, Criminal Pleading, 88, 89.
Com. v. *Butterick*, 100 Mass. 12, 17.
Com. v. *Goldstein*, 114 Mass. 272, 276.
Edwards v. *Com.*, 19 Pick. 124–126.

Taking the first count as a sample, the allegations of the date, July 23, 1891, and the allegation of doing a certain act upon that date being the act complained of, namely, that Potter did then and there, to wit, on said twenty-third day of July, etc., certify a certain check by then and there placing across the face of said check, etc., fixes a precise moment of time upon that day.

As the words "then and there" cannot be used distributively to mean several distinct times, any subsequent use of the words "then and there" must be limited to refer to and be construed to mean the precise moment of time thus fixed.

The subsequent allegation, "which said check was then and there of the tenor following," refers, then, and must refer, to the precise moment of the certification, that is, of the act complained of in the indictment.

Now the check as set out in the indictment of the tenor following shows of itself that it is not certified, and the words "tenor following" call for an exact description.

There is, therefore, a variance between the check when produced with the certification thereon, and the allegation that co-existent with such certification the check was uncertified.

III. THE TWO OFFERS OF EVIDENCE MADE BY THE PLAINTIFF IN ERROR, AND THE REQUESTS FOR RULINGS BASED UPON THEM.

The offers are embraced in assignments Nos. 6, 8, 9, 10, and 11, and the requests in assignments 15, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 41, 42, 43, 49, 50, and 51.

The offers, which are more fully stated in the bill of exceptions, statement of facts, and assignments, were to show:

(1) Through Mr. Work, that the Evans debit balance was treated as a loan by understanding between the parties; that interest was charged on this loan each day; that there was a general limit to this loan not to exceed $200,000; and that it was secured by collateral.

(2) To show through Mr. Potter that an agreement was made between himself, acting for the bank, and Mr. Evans, in the early part of 1891, before the certification of the checks in question, that Evans & Company might have a loan by overdraft limited to $200,000, with interest at six per cent, with collateral; that the overdrafts in June and July, 1891, were under this agreement; that collateral was actually deposited; that this agreement was communicated to the executive officers of the bank and a majority of the directors, who approved it.

Also a conversation was offered between Mr. Evans and Mr. Potter in relation to the certification of checks and deposits connected with this certification, in which Mr. Potter told Mr. Evans he must have deposits in the bank to certify against if he was going to have certified checks, and

from that time forward deposits were in, to Mr. Potter's knowledge, the defence claiming that the parties to the conversation understood distinctly that the daily deposits were to be in for the very purpose of certifying checks.

The plaintiff in error claims that this evidence was admissible on three grounds:

A. As a matter of substantive defence;

B. As a part of the *res gestæ;*

C. As specifically bearing upon the question of criminal intent and negativing it.

A.

As a matter of substantive defence.

The offers of evidence showed that there was a deposit at the time of certification, the issue being whether the drawer has on deposit with the association an amount equal to the amount of the check certified. It appeared in evidence that there was, each morning of the day on which checks were certified, a large debit balance; three deposits during the day for large amounts, aggregating less than the debit balance, but more than the certifications and checks certified. The court held that the deposits as they came in were swallowed up by the debit balance, and that there was no money on deposit. The defence claimed that the debit balance was an agreed loan; that the deposits were not swallowed up by it, but constituted a sum on deposit within the meaning of the statute applicable to certifications.

(a) The overdraft of Evans & Company was a lawful loan, and there was, therefore, money on deposit at the time of each certification.

The words of the statute, "has on deposit at the time such check is certified an amount of money equal to the amount specified in such check," are used according to the common understanding, and not technically. A person never has on deposit any sum of money with a bank, unless in the case of a specific bailment. A deposit, when made in a bank, creates simply the relation of debtor and creditor between the bank and the depositor.

The Supreme Court say in *Phœnix Bank* v. *Risley*, 111 U.S. 127,—

> "That the relation of the Phœnix Bank and the Georgetown Bank was that of debtor and creditor, and nothing more, has been the settled doctrine of this court, as it is believed to be of all others, since the case of *The Marine Bank* v. *The Fulton Bank*, 2 Wall. 252. In that case it was said that 'All deposits made with bankers may be divided into two classes, namely, those in which the bank is bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof on demand.

It would be a waste of time [said the court] to prove that this latter was a debtor and creditor relation.'

"This proposition has been reaffirmed in —

Thompson v. *Riggs*, 5 Wall. 663.
Bank v. *Millard*, 10 Wall. 152.
Oulton v. *Savings Inst.*, 17 Wall. 109.
Scammon v. *Kimball*, 92 U.S. 362.
Newcomb v. *Wood*, 97 U.S. 581."

That the words "has on deposit" refer to a specific bailment is inconceivable. Business is not transacted in that way. They must, then, refer to the ordinary debtor-and-creditor relation between the bank and a customer, commonly known as the deposit account.

Assuming, then, that the words "on deposit" refer to the ordinary debtor-and-creditor relation between a bank and its customer, that Evans & Co. did have money on deposit as required by the statute if the overdraft of the preceding day be disregarded, will appear by construing further the meaning of the words "on deposit" in the light of banking usages and customs. Aside from such usages, it might be contended that to have money "on deposit" means that the customer of the bank shall be a creditor of the bank at the moment of certification to a greater amount than the bank is a creditor of such customer; but it is perfectly clear that such is not the meaning of the statute when we look at the usages of bankers with reference to which this act must be supposed to have been drawn. Certainly, though the customer of a bank be indebted to the bank on demand paper or overdue paper to an amount far in excess of the balance on his general account, he has

money on deposit within the meaning of the statute. All that is necessary under the statute is that, *leaving loans to the customer out of account*, the customer shall have a sufficient balance on his account to meet certifications. What form the loan may take should be entirely immaterial. The statute is nothing better than a trap if a loan made in good faith in a proper and customary way renders the banker liable to indictment, whereas if made in another way he is innocent, and we cannot believe that this court will sustain such a construction. The method of loaning money by a secured overdraft has been a common way of loaning money for more than one hundred years, and it is to-day, we venture to assert, a common way of loaning money in nearly, if not quite, every quarter of the civilized globe. It is not only a common way of doing business, but it is a way of doing business spoken of with commendation by writers on banking. The following extracts from writers of recognized authority will substantiate these statements.

Smith's Wealth of Nations, book ii, ch. ii:

"The commerce of Scotland, which at present is not very great, was still more inconsiderable when the two first banking companies were established; and those companies would have had but little trade had they confined their business to the discounting of bills of exchange. They invented, therefore, another method of issuing their promissory notes, by granting what they called cash accounts; that is, by giving credit to the extent of a certain sum (two or three thousand pounds, for example) to any individual who could procure two persons of undoubted credit and good landed estate to become surety for him that whatever money should be advanced to him, within the sum for

which the credit had been given, should be repaid upon demand, together with the legal interest. Credits of this kind are, I believe, commonly granted by banks and bankers in all different parts of the world. But the easy terms upon which the Scotch banking companies accept of repayment are, so far as I know, peculiar to them, and have, perhaps, been the principal cause both of the great trade of those companies and of the benefit which the country has received from it.

"Whoever has a credit of this kind with one of those companies, and borrows a thousand pounds upon it, for example, may repay this sum piece-meal, by twenty and thirty pounds at a time, the company discounting a proportionable part of the interest of the great sum from the day on which each of those small sums is paid in, till the whole be in this manner repaid."

McLeod's Theory and Practice of Banking, vol. i, pp. 390, 391 (ch. vii.):

"81. This cash-credit system, then, was a system of pure credit of pure accommodation paper; but it was generally used with such discretion, that, after having examined witnesses very fully upon it, the House of Lords reported, —

> "'There is one part of their system, which is stated by all the witnesses (and, in the opinion of the committee, very justly stated) to have had the best effects upon the people of Scotland, and particularly upon the middle and poorer classes of society, in producing and encouraging habits of frugality and industry. The practice referred to is that of cash credits. . . . From the facility which these cash credits give to all the small transactions of the country, and from

the opportunities which they afford to persons who begin business with little or no capital but their character, to employ profitably the minutest products of their industry, it cannot be doubted that the most important advantages are derived to the whole community.'

"82. The testimony of every one who has any experience of Scotland is unanimous in favor of the remarkable effects this system has had in promoting the prosperity of the country and the morals and conduct of the people. It is no exaggeration whatever, but a melancholy truth, that at the period of the revolution of 1688 and the establishment of the bank of Scotland, that country, partly owing to such a succession of disasters as cannot be paralleled in the history of any other independent nation, and partly owing to its position in the very outskirts of the civilized world, and far removed from the humanizing influence of commerce, was the most utterly barbarous, savage, and lawless kingdom in Europe. And it is equally undeniable that the two great causes of her rapid rise in civilization and wealth were her systems of national education and banking. What the river Nile is to Egypt, that is the banking system to Scotland, and it was fortunate for her that the foundations of her prosperity were laid broad and deep before the gigantic fallacy was dreamt of that the issues of banks should be inexorably restricted to the amount of the gold coin they displace.

"84. Cash credits do not differ in their nature from overdrafts, which are extensively practised by English private bankers, only that they are reduced to a much more regular system, and are governed by their own methodical rules, and are appropriated to certain particular purposes

in the banking system. The very extent to which overdrafts prevail, which form the staple of a great proportion of English country banking business, is a proof that cash credits may well exist without a £1 note currency."

In an article in the "Forum" for September, 1893, entitled, "The Scotch Banks, their Branches and Cash Credits," by Mr. A. S. Mackie, the president of the Royal Bank of Scotland, he says, referring to the debtor,—

> "He goes to the bank and arranges a cash credit for a specific sum. When it is established by the banker, he may then check against it whenever it suits him. He may draw as little of it or as much of it as he pleases, but he must never exceed the maximum sum arranged for. Interest is charged to him day by day only upon the sum of which he is found to have availed himself each day. The cash credit is of the nature of a permanent arrangement, and, so long as confidence is maintained and everything works smoothly, it may and often does, exist for years."

He further says that the cash-credit system has largely contributed to the wealth of Scotland.

This state of facts constituting the cash-credit system of Scotland, almost in the express terms describes the offer made by the defendant, except that the defendant further offered to show that collateral was deposited against this overdraft loan.

Loaning by overdraft is a well-established method of banking in many sections of this country and abroad.

It is a matter of common knowledge that overdraft loans are frequently made in the West and Southwest and in New York.

That the bank had power to make a loan by overdraft, there can be no question.

In *Hubbard* v. *Charlestown Branch R.R.*, 11 Met. 128, SHAW, C.J., says, —

> "But we think an overdraft on a bank is not necessarily wrongful; it may be made in conformity with some mutual agreement or understanding. A draft on a bank by one who has no funds, or beyond his funds, and a payment made in pursuance of it, constitute a loan of money." . . .

(b) Each day's deposit was not absorbed immediately by the overdraft, but was money "on deposit."

Revised Statute 5208 forbids certification "unless the person or company drawing the check has on deposit with the association at the time such check is certified an amount of money equal to the amount specified in such check."

Evans & Co. did have, when each of the checks here in question were certified, an amount of money more than equal to the amount specified in such checks, if the overdraft at the end of the previous day is not reckoned. Had nothing been said between the parties, unquestionably the overdraft would have to be included in the calculation; but in this case proof was offered of an express agreement, known to and authorized by a majority of the directors of the bank and of which the officials of the bank were notified. By this agreement, each day's certifications were to be made against each day's deposits. This presents an

important question even if it be held that the loan by permission to overdraw, which the defendant offered to prove could not be regarded in the same light as a loan by discount of the note of Evans & Co., for it can hardly be doubted that a check could be certified against a special deposit, even if the depositor's account were overdrawn. This is expressly admitted in Judge PUTNAM's charge (Record, p. 157), and it seems clear that in such a case the depositor "has on deposit an amount of money equal to the amount specified" in the certified check, that is, in the special deposit. The fact that he is indebted on another account is as immaterial when the debt arises from an overdrawn running account as when it arises from a demand note. The statute does not and cannot mean that the drawer of the check must, at the time of certification, be a creditor of the bank to a greater amount than he is a debtor to the bank. Such a construction would make almost every experienced bank officer a criminal.

To draw a valid distinction between the case of a special deposit and the present we believe to be impossible. The following extract from the charge will show the distinction attempted: —

> "I say to you that, *prima facie*, the deposits as they came in were, in fact, applied towards the liquidation of the overdraft which appeared each day at the commencement of business and were thus absorbed; and that, as it is apparent and admitted that the entire amount of deposits was not equal to the overdrafts with which the day commenced, you should consider that, as matter of fact, there were no moneys on deposit at any portion of the 23d, 24th, or 25th of July against which checks could be certified. But, gentlemen, it is

claimed upon the other side that, notwithstanding the facts to which I have called your attention, certain deposits were set aside for the purpose of meeting or covering checks that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks were so treated by the bank as to become themselves a deposit in some form, would not sustain a defence in this case. I instruct you that the setting aside of a check temporarily, or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it, would not meet the purpose of this statute unless it was made itself the basis or a part of a deposit; and I instruct you, gentlemen, that, unless the defence can show or does show that, as a matter of fact, certain checks were set aside, not a matter of agreement, not tha there was an agreement to do so, but unless they show to you that as a matter of fact certain checks were set aside as a deposit, according to the proper course of business, and appearing upon the books and papers of the bank as against which checks might be certified, this proposition will not avail the defence." (Record, pp. 156, 157).

There is some conflict in the cases upon some parts of the law governing the appropriation of payments, but not on matters which concern this case. As to such points the law is clear. Judge STORY expressed the law as it is uniformly held in —

United States v. *Kirkpatrick*, 9 Wheat. 720, 737:

"The general doctrine is, that the debtor has a right,

if he pleases, to make the appropriation of payments; if he omits it the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice."

Numerous cases to the same effect may be found collected in —

18 Am. & Eng. Cyc. of Law, 234.

It will hardly be contested that, in general, an agreement between debtor and creditor as to the application of a payment will be controlling, but argument may be addressed by the government to either of two points to show that the general rule has no application here. It may be argued by the government, —

1. That, in the case of a running account, payments must, as matter of law, be applied in satisfying debits in the order of time.

2. That the entry of deposits in the general running account, without explanatory entries, either conclusively proves an application of the deposits to an existing overdraft, or, in other words, estops the defendant from showing the actual agreement.

Neither of these contentions can be supported.

I. Payments in a running account will be appropriated according to the intention of the parties, if that is indicated.

The case which established the prevailing rule in regard to the appropriation of payments in a running account is *Clayton's Case*, 1 Mer. 572, where Sir WILLIAM GRANT, M.R., speaking of a bank account, said (p. 608), —

> "In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out; it is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."

Sir W. GRANT's rule was followed by the law courts, and it is well settled that, in the absence of a contrary intention, this rule will be applied.

See, for a collection of cases, 18 Am. & Eng. Cyc. of Law, 249.

But this rule is only applicable to cases where the parties have made no appropriation themselves, and it is so qualified in the cases.

Thus, in *Postmaster General* v. *Furber*, 4 Mason, 333, 335, STORY, J., says, —

> "In such case the payments are to be applied to extinguish antecedent items on the debit side, *there being no specific appropriation by either party.*"

So, in *Leef* v. *Goodwin*, Taney's C.C. Dec. 460, 462, that learned judge said, —

> "In cases of running accounts between the parties, *unless there are some particular circumstances to vary the rule*, the payments ought to be applied to extinguish the debts according to the priority of time."

And similar qualifications of the general rule may be found in —

Gass v. *Stinson*, 3 Sum. 99.
Harrison v. *Johnston*, 27 Ala. 445.
Dunnington v. *Kirk*, 57 Ark. 595.
Sprague v. *Hazenwinkle*, 53 Ill. 419.
Steenberger v. *Gowdy*, 19 S.W. Rep. 186 (Ky.).
McKenzie v. *Nevius*, 22 Me. 138.
Upham v. *Lefavour*, 11 Met. 174.
Goetz v. *Piel*, 26 Mo. App. 634.
Hill v. *Robbins*, 22 Mich. 475.
Hersey v. *Bennett*, 28 Minn. 86.
Winnebago Mills v. *Travis*, 58 N.W. Rep. 36 (Minn.).
Caldwell v. *Wentworth*, 14 N.H. 431.
Truscott v. *King*, 6 N.Y. 147.
Pierce v. *Sweet*, 33 Pa. St. 151.
Willis v. *McIntyre*, 70 Tex. 34.
Shedd v. *Wilson*, 27 Vt. 478.

The leading case in this court on the application of payments in a running account is *Jones* v. *The United States*, 7 How. 681. The suit there was against the surety on a postmaster's bond. By statute such sureties were only liable for a default occurring within two years before the suit. The postmaster in question had been charged quarterly with the amounts due from him to the treasury, and from time to time had made payments. For nearly four years he had been continuously indebted to the treasury, but if all payments made by him up to the time of the suits were appropriated to the payment of the earliest deficits, the indebtedness remaining would all have accrued

within two years. The court held, after examining all the cases previously decided by the court, that the government was entitled to apply the payments in this way; the court saying (p. 692), —

> "To this mode of application no just objection can be perceived; the parties interested in the payments were the same throughout, and equally liable for all: *the payments being made generally, and without any appropriation by the debtors* who were thus liable, it was the undoubted right of the creditor to apply them to any sums antecedently due."

There is a clear implication here that, if the debtor had made another appropriation, this mode of application would not be followed.

It is entirely possible, too, for a bank or other creditor, when not otherwise directed by the debtor, on receiving a payment, not merely not to apply the payment to discharge the oldest item of indebtedness, but also to keep the payment as a deposit and not apply it to the payment of any debt at all. This is illustrated by a class of cases arising from the following state of affairs: A bank holds a note at maturity made by a customer who has, at the maturity of the note, or afterward makes, a deposit, and the bank does not apply the deposit to the payment of the note, but instead sues a party secondarily liable on the note. Various circumstances may make this a desirable policy. It is well settled that the party sued cannot maintain the defence that the deposit was as matter of law, or should have been as matter of fact, applied to the payment of the note.

Strong v. *Foster*, 17 C.B. 201.
Henniker v. *Wigg*, 4 Q.B. 792.

City Discount Co. v. *McLean*, L.R. 9 C.P. 692.
National Mahaiwe Bank v. *Peck*, 127 Mass. 298.
National Bank of Newburgh v. *Smith*, 66 N.Y. 271.
Martin v. *Mechanics Bank*, 6 Har. & Johns. 235.
Voss v. *German American Bank*, 83 Ill. 599.

In *National Mahaiwe Bank* v. *Peck*, 127 Mass. 298, 301, Mr. Justice GRAY, then Chief Justice of the Supreme Judicial Court of Massachusetts, expressed the law thus:

> "The general rule accordingly is, that where moneys drawn out and moneys paid in or other debts and credits are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but when by express agreement, or by a course of dealing between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker."

The principles thus stated cover the case at bar. Here by express agreement between the depositor and the banker certain deposited checks were not to be included in the general account, but only such balance of them as might remain after satisfying the certified checks drawn against them. The consequence must follow that the deposited

checks are not to be applied to the deficit of the account until the certified checks are satisfied.

Several cases have arisen in New York having considerable similarity in their facts, so far as the question of appropriation of payments is concerned, to the case at bar.

In *Thompson* v. *St. Nicholas Bank*, 113 N.Y. 325, the action was for the possession of certain bonds, which had originally been deposited with C. and M., stock brokers, as security or "margin." C. and M., their account being at the time overdrawn, deposited them with the defendant, and at the same time the defendant certified checks. Large deposits were made on the same day. The court held that the defendant, having certified checks, even though illegally, on the faith of the bonds, was a purchaser for value, and as such to be protected. In disposing of one of the contentions of the plaintiff, the court said (p. 333),—

> "The application of the deposits of the eighteenth day of April to the extinguishment of the unpaid balance of account existing against C. and M. on the morning of that day, instead of the indebtedness created by the payment of the certified checks, was properly made and could not be questioned by the plaintiffs. The demand upon which they were applied was a running account comprised of a number of items accruing at different times, all equally secured by the collaterals held by the defendant, but which were always insufficient to satisfy the whole debt. Under such circumstances, *in the absence of any express application of payments by the parties*, the law applies them to the earliest items of the account;" citing—

Truscott v. *King*, 6 N.Y. 147.
Harding v. *Tifft*, 75 N.Y. 461.
Webb v. *Dickinson*, 11 Wend. 62.
United States v. *Kirkpatrick*, 9 Wheat. 720.
Munger on Payments, 102.

The decision of the New York Court of Appeals was affirmed by this court, 146 U.S. 240.

In *Straus* v. *Tradesmens Nat. Bank*, 122 N.Y. 379, one Dixon, at the plaintiffs' request and for their accommodation, delivered to them his check, payable to their order drawn upon the defendant bank, it being understood that Dixon had no funds to meet the check and that the plaintiffs would furnish the means. Upon the next day the plaintiffs drew their check upon the Hanover National Bank for the amount of the former check, payable to the order of one of them, who, upon deposit of Dixon's check to their credit, procured it to be certified by the drawee, and sent it by a messenger to be deposited to Dixon's credit in the Tradesmens Bank. The messenger delivered the check to the teller with directions to apply it to the payment of Dixon's check. The defendant bank sought to apply the deposited check in part to the payment of a balance due it by Dixon. The trial court found that the deposit was made for a special purpose known to the bank. It was held that this finding was warranted and that the fund could not be diverted. The court also say:

> "The omission in the deposit slip to make any reference to the purpose of the deposit other than that it be made to the credit of Dixon, was only a circumstance bearing upon the disputed question of fact, upon which the weight of evidence must here be

treated as conclusively disposed of in the court below" (p. 384).

Still more explicit are the remarks of the court in *People* v. *St. Nicholas Bank*, 84 Sup. Ct. Rep. (77 Hun,) 159, 167. This was a petition by depositors to obtain from the receiver of an insolvent bank the return of certain checks deposited December 20, the day before the bank closed its doors, or an order that the receiver pay checks, certified and uncertified, which had been drawn by the petitioners on that day. The lower court granted the petition so far as to order the receiver to pay checks certified on December 20 and presented at the clearing house December 21, on the ground that by custom a depositor's deposits of a particular day were appropriated to his obligations maturing that day and payable through the custom house. The Supreme Court, while rejecting this theory, said (p. 167), —

> "If the checks which the bank received from its depositors on December 20 and sent to the clearing house on the 21st, constituted a trust fund for the purpose of meeting the checks certified on the 20th, then the receiver, standing in all respects in the bank's stead, would have the same duty and obligation of carrying out the trust, — a duty which equity could compel him to perform. That deposits may be special, so as to create a trust or an appropriation as between the parties, is evident. *To prove that requires no more than evidence that the intention and desire were communicated by the depositor to the bank, and that the latter agreed, or is estopped from denying that it agreed to so apply the deposit.*"

If the decision in *Straus* v. *Tradesmens Bank* and the language of the court in all three of these New York cases, are sound, the agreement between Evans & Co. and the defendant was effectual to make each day's deposits applicable to the certifications agreed upon, and it was error to exclude the evidence.

2. The entry of deposits in the general account is not necessarily an application of them to the overdraft, nor does it estop the defendant from showing the actual agreement.

The question of estoppel cannot arise here. No one has altered his position relying on the way the books were kept. The case is not analogous to that suggested in *Simpson* v. *Ingham*, 2 B. & C. 65, per BAYLEY, J., and referred to in *Jones* v. *United States*, 7 How. 681, 690, where an entry was made by one party on a pass book and communicated to the other party, without further understanding or agreement. In such a case it might well be that the party making the entry could make no other appropriation than the law would infer from such an entry. But here the case is different. As shown above, the rule that, in a running account, credits go towards the cancellation of debits in the order of time is not a rule of law applied contrary to the intention of parties, but a rule to be applied in the absence of expressed intentions, because presumably in accordance with their intentions. And the fact that the parties make the entries of their transactions in a simple debit and credit account while it might, in the absence of

evidence to the contrary, justify an inference that the parties intended the rule in *Clayton's Case* to be applied, would not justify the exclusion of evidence. This was directly decided by the court of Queen's Bench and by the Exchequer Chamber.

Henniker v. *Wigg*, 4 Q.B. 792.
City Discount Co. v. *McLean*, L.R. 9 C.P. 692.

In *Henniker* v. *Wigg*, the defendants had signed a bond in favor of the plaintiffs to secure advances to one of their number. Advances to the amount of the bond were at once made. Subsequently sufficient deposits were made in the account to offset these advances, but still later the account showed an overdraft exceeding the amount of the bond. The court said it was claimed by the defendants "that the whole formed one account, and that an ordinary banking, in which according to the language of Sir W. GRANT, M.R., all the sums paid in form one blended fund, the parts of which have no longer any separate existence; and that 'it is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side.' *Clayton's Case*, 1 Mer. 530, 672; and *Bodenham* v. *Purchas*, 2 B. & Ald. 39, in which case the doctrine of Sir W. GRANT was fully adopted. And it is presumed that, generally speaking, and with reference to a case like that which he was considering more especially, the doctrine of that eminent judge admits of no doubt. But it is equally certain that a particular mode of dealing, *and more especially any stipulation between the parties*, may entirely vary the case, and that would be the effect, in the present instance, if it should appear that this bond was given to secure the plaintiffs against advances which they might

from time to time make to the defendant, Lionel. That would show that the amount of it was not to be brought into account like any other item, in the manner supposed by Sir W. GRANT."

In *City Discount Co.* v. *McLean*, the action was upon a guaranty given to secure advances, and the account had fluctuated, at times all advances being nearly or quite equalled in amount by the credit items. Copies of the ledger showing the debit and credit items had been furnished the depositor from time to time. It was contended that the advances guaranteed had been repaid by the subsequent credits. But the court held otherwise. BRAMWELL, B., said, —

> "We must decide every case according to its own circumstances, and it seems to me impossible under the circumstances of the present case to hold that the items of credit must be appropriated to the items of debit in order of date, so as to extinguish the earlier items of debit" (p. 698).

And BLACKBURN, J., said, —

> "But it is contended that, as a matter of law, though there is no authority so deciding, or as an inference of facts, though it is contrary to all probability, we are bound to hold that the £5000 is to be considered as paid off. . . . I cannot draw such an inference either as matter of law or of fact" (p. 701).

BRAMWELL, B., also makes some pertinent remarks in regard to the way bankers' books are kept (p. 699):

> "The matter would have been abundantly plain if

they had thought fit to keep their books in a different way, which for business purposes would have been very inconvenient, viz., by debiting the advances in the first instance, and not giving credit for the bills, but keeping a separate account as to them. It is manifest that then the advance on the credit of the guarantee would have been unaffected by the subsequent transactions. It could not be suggested that it was diminished or paid off by what took place with regard to the accommodation bills, or even by the trade bills. But no banking house or discount company, having transactions such as these with a customer, in practice keeps the account so. For convenience' sake they keep it in such a manner as to see at any time the state of the balance, assuming that all outstanding securities are realized."

In the case at bar also, the matter would have been abundantly clear if each day's deposits had been put in a separate account, and the daily balance after deducting the amount of certified checks carried to the general account. But here, as in the English case, the account was kept in the ordinary form; and here, too, the substance, not the form, of the transaction should be regarded.

In this country also there are decisions to the same effect.

In *Mack* v. *Adler*, 22 Fed. Rep. 570, the plaintiffs sought to enjoin the sale of their property under a lien claimed by the defendants as security for a note. The defendants had received money from various sources from the plaintiffs and had also made advances to them. The court said, —

"The plaintiffs insist that Adler, Goldman & Co. must be held to the state of the case disclosed on the face of their books, and, after that is done, they insist upon the application of the rule that, in case of running accounts, the first item on the credit side of the account will be applied to extinguish the first item on the debit side of the account. The rule for the appropriation of payments in the case of running accounts is accurately stated, but it has no force when the proof shows an understanding of the parties to the contrary. *Price* v. *Dowdy*, 34 Ark. 285; 2 Whart. Cont. § 933. If regard is had to the books alone, the indebtedness existing at the date of the note, and which constituted its only consideration, would appear to be paid, and its payment would extinguish the note and the lien to secure its payment. But in fact that indebtedness has not been paid. The legal effect of the understanding of the parties was to segregate from the account then due from Poe & Co. to Adler, Goldman & Co. the amount for which the note was executed, and extend the time of payment on that amount until the maturity of the note. It is true, there is nothing on the books of Adler, Goldman & Co. to indicate this understanding of the parties; *but the failure to make their books harmonize with their agreement cannot operate to the prejudice of either party. The understanding of the parties may be shown and will control.* As was said by Mr. Justice EAKIN in *Price* v. *Dowdy*, *supra*, —

"'*The complainant may have kept his account in this manner for convenience, and he is not estopped thereby.*'"

In *Price* v. *Dowdy*, 34 Ark. 285, the plaintiff kept a run-

ning account with the defendant, copies of which were furnished the defendant from time to time. On this account were entered in order of times as charges accommodation acceptances, advances and charges for supplies, and certain credits. If the rule in *Clayton's Case* were applied, the liability for the accommodation acceptances for which the plaintiff held security would have been discharged. The court refused to apply this rule, saying, —

> "This results only from a presumption of intention, and may be controlled by evidence. It was competent to show a different agreement. The complainant may have kept his account in this manner for convenience, and he is not estopped thereby. There is evidence to show an agreement that the proceeds should be applied first, to the open and unsecured account."

In *Dulles* v. *DeForest*, 19 Conn. 190, the head note, which gives the substance of the case with accuracy, is:

> "C, D, & E, having received the goods of A for sale on commission, and having advanced to A the sum of two thousand dollars to aid him in a branch of manufacture distinct from his general business, by accepting his drafts on time, and afterwards paying them, blended, in one general account upon their books, the account so advanced to A with the avails of the goods of A sold by them; such acceptances being charged when they were given, and not when paid; and such account was from time to time rendered by them to A. Neither party having made any specific application of the moneys arising from the sale of A's goods to the payment of the sum so advanced, it was *held*, (1) that the presumption of law from the mode of keeping

the account, was, that the payments were to be applied to the oldest items on the opposite side; but (2) that this rule, being founded on the presumed intention of the parties, is applicable only where there is no evidence sufficient to show a different intention; and where there is, that intention, when ascertained, must govern the application; (3) that in this case, the intention of the parties might be gathered, not only from the mode of keeping the account, but from the course of dealing between the parties, the object for which the note was given, and suffered to remain in the hands of the holders, and from all the circumstances of the case."

The method of bookkeeping in the Maverick National Bank, however, was not on its face necessarily inconsistent with the intention of the parties. The deposits of each day were entered separately on the books of the bank. They were not subtracted from the deficit during the day, which might indicate they were intended to be absorbed by it. It was not till the end of the day that the previous day's deficit was taken into the account of the day and merged with it. It may be said that the method of bookkeeping adopted was ambiguous, but it cannot be said that it contradicted the evidence offered of the understanding of the parties. The oral evidence was therefore admissible, even if the point were free from the authority of the cases already cited, under the well-known rule that the meaning of ambiguous writings may be explained by parol evidence, — a rule too familiar to require the citation of authority.

See, also, the cases already cited of —

Thompson v. *St. Nicholas Bank*, 113 N.Y. 325.

Straus v. *Tradesmens Bank*, 122 N.Y. 379.
People v. *St. Nicholas Bank*, 84 Sup. Ct. N.Y. (77 Hun) 159, 167.

It should be observed that the rule of law contended for, as applied to such a case as the present, does not conflict with sound policy in banking. If a depositor, already overdrawn one hundred thousand dollars, wishes a check certified against money or its equivalent deposited at the same time, the certification does not injure the bank's position: it has received good consideration for the certification, consideration which it received only on the terms of giving the certification, and which it cannot be assumed it would otherwise have received. Certification of a check can hardly be regarded as a more objectionable or dangerous act than payment of actual money, and there would obviously be nothing improper in the paying of money out on the deposit of checks of other parties — that, is the cashing of such checks — when a depositor's account was overdrawn. The meaning therefore which is here contended for as the true meaning of section 5208 would forbid certification of the checks of one whose account was overdrawn unless in some way by deposit or loan an equal amount of money were provided and dedicated to the certification, which, it is submitted, is a reasonable construction, having regard either to technical law or the mischief to be stopped.

The ruling of the court below affords no more substantial protection against undesirable certification than the construction suggested, for the merest formality, such as the opening of a second account on the books of the bank and taking out another pass book, would satisfy the requirements suggested; and unquestionably the mere requirement of a demand note for the deficit in the account would have

kept the defendant within the limits of the law. While the court's ruling thus affords no more substantial protection than that believed to be the true one, it is open to the grave objections of being wholly at variance with the settled law as to appropriation of payments, of making guilt or innocence turn on the form, and not the substance, of a transaction, and of laying a trap liable to catch a banker following proper banking methods. This may well happen. In view of the widespread custom of merchants and bankers, an arranged overdraft cannot be considered an improper method of loaning moneys to a customer; and yet, if it were kept on the books in the form of an overdraft, — the natural way to keep it, — no matter how well secured by collateral, an officer of the bank who certified a check of such a customer without first cancelling this overdraft in some way on the books would be guilty of a crime.

(c) The following requests as to application should have been given to the jury:

Not only, then, was the exclusion of the evidence offered by the defence a clear error, but further, the defence claims that, upon the facts admitted in evidence, the following requests should have been given to the jury: —

Request No. 44 (Record, p. 148), assignment error No. 58 (Record, p. 184), as follows: —

> "The question whether the bank made an application of the daily deposits to the debit balances, or otherwise, is a question of fact for the jury."

Taking the facts as they appeared in evidence on July

23, 24, and 25, and as they were allowed to go to the jury, — a debit balance on the morning of each day; interest charged upon it each day and appearing in the account; large deposits, $50,000 or $55,000, each morning; these deposits marked upon the pad; checks brought in for certification; the clerk comparing the amount of the checks with the deposit and the subsequent certification; no balance being struck in this account till the end of the day; — and taking the law as laid down by Chief Justice MARSHALL in *Tayloe* v. *Sandiford*, 7 Wheat. 20, "A direction may be evidenced by circumstances as well as by words; a payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it;" and the defence claim that, under these circumstances, it was competent for the jury to find that there was an application by the bank of the deposits to the certifications, and that the court erred in not leaving this question to the jury.

Request No. 45 (Record, p. 148), assignment error No. 59 (Record, p. 184):

> "The law will not apply payments according to the presumed interest of the parties except where an [no] application has been made, 1st, by the debtor; 2nd, by the creditor; or 3d, by agreement between the debtor and the creditor."
>
> *United States* v. *Kirkpatrick*, 9 Wheat. 720, 737.

The court refused to so instruct the jury, and the defendant excepted to such refusal.

B.

The offers were admissible as part of the res gestæ and of the transaction.

The issue being whether money was on deposit, a sufficient deposit being shown, an overdraft being also shown large enough to exhaust the deposit, the evidence offered that the overdraft was an agreed loan, and that there was an agreement to specifically apply the deposits to the certification, are clearly admissible as part of the *res gestæ*.

The Supreme Court, by Mr. Justice SWAYNE in *Beaver* v. *Taylor*, 1 Wall. 637–642, say, —

> "It is perhaps not possible to lay down any general rule as to what is a part of the *res gestæ* which will be decisive of the question in every case in which it may be presented by the ever-varying phases of human affairs. The judicial mind will always be compelled frequently to apply the general principle and deduce the proper conclusion. The circumstances to which we have just adverted furnish the tests by the light of which the question, whenever it arises, must receive its solution."

The facts are as follows: This was an action of ejectment. The plaintiff showed title in himself, and the defendant claimed under a statute requiring him to prove, among other things, payment of taxes for a period of years.

In proving payment of taxes, the defendant offered two receipts, without date, from the collector to one Gilbert, one for road taxes, the other for state and county taxes, for the year 1847, and gave evidence that, during the years

1847 and 1848, Gilbert was agent of the defendant in respect of taxes.

The plaintiffs objected to the receipts because it did not appear when the taxes were paid. To meet this, defendants offered two letters from Gilbert to the defendants, one of March 10, 1848, enclosing the receipt for state and county taxes, the other of May 4, 1848, enclosing receipt for the road tax. They also offered certain entries in an account book of defendants, relating to the property in question and other property. The letter gave an account in detail of Gilbert's debits and credits as agent, in respect of the taxes, and referred particularly to the receipts in question. The books contained entries relating to the same subject and showing the recognition of his agency in the transaction. The court admitted all the evidence, and the plaintiff excepted.

The court say, —

> "In connection with the proof of Gilbert's agency in paying the taxes, it was clearly proper to allow the receipts to go in evidence to the jury. . . . The letters and account stand upon a different footing, and their competency is not so free from doubt; but, after the fullest consideration, we are all of opinion that there was no error in admitting them. It was proper for the agent to transmit the receipts to his principal. What was said and done in that connection was a part of the *res gestæ*. The contents of the accompanying letters relative to the receipts are within the rule upon that subject. The entries in the books of Taylor & Davis, after the receipts came to hand showing their action, were admissible for the same reasons. Both

the letters and entries belong to the same category with what are called 'verbal facts,' and neither fall within the rule which excludes *res inter alios acta*, hearsay and declarations made by the party offering them in evidence."

"The principal fact was the transmission of the receipts. *The other facts so illustrate and characterize it as to constitute the whole one transaction and render the latter necessary to exhibit the former in its true light and give it its proper effect.*"

In *Insurance Co.* v. *Mosley*, 8 Wall. 397, 408, where the question was on the admission of declarations of the decedent after an injury, the court say, —

"In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the *verbal fact* would not unfrequently have the same effect as to strike out the controlling member from a sentence or the controlling sentence from its context.

"Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured, almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. . . .

"The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its

results. There is none which rests on a more solid basis of reason or authority."

Bank v. *Kennedy*, 17 Wall. 19, was a question of accounting between two banks. Kennedy, receiver of Merchants Bank, sued the Metropolis Bank to recover balance due on a $50,000 check. Metropolis Bank admitted liability on check, but delivered, as part payment of the $50,000 check, a note for $20,000, made by C. A. Sherman, cashier of Merchants Bank, claiming this note was the obligation of the Merchants Bank, though signed by Sherman individually.

The principal issue was whether this note was given by Sherman on his own account or on account of the Merchants Bank. Verdict was given for the plaintiff, and the question came up on rulings as to evidence and as to correctness of the charge.

The plaintiff proved by Sherman the circumstances under which the note had been given to the defendants, the substance being that he applied to defendants' cashier for loan of $20,000 to purchase some stock in Merchants Bank, and the note was given for that loan with stock as collateral; that he received two drafts for $10,000 each, payable to C. A. Sherman, cashier; that he endorsed them as cashier, and that proceeds went to Merchants Bank. The drafts being produced in evidence, the plaintiff's counsel asked the witness what took place when the drafts were about to be drawn between him and the defendants' cashier in regard to the form of the drafts. This evidence was allowed, and excepted to.

The court say, —

"It is argued by the counsel for plaintiffs in error

that this evidence was calculated to explain or vary the legal effect of the drafts themselves. We do not think so. Those drafts are not sued on in this action. They are introduced merely as part of the *res gesta* of the loan, and the conversation of the parties on the subject of the drafts was also a part of that *res gesta*. They equally constituted parts of the transaction. . . . As the form of the drafts might confuse the jury, the plaintiffs had a clear right to explain how they came to be made as they were. The fact in question was the loan. The circumstances of the negotiation constituted the *res gesta* of the loan. The drafts were one of these circumstances: the conversation of the parties was another. Evidence of the reason why a loan was made in particular funds or securities instead of cash is perfectly competent where it will tend to elucidate the nature of the transaction, when that is the question at issue. The question here was whether the loan was made to Sherman or to the bank. The note given for the repayment of the loan was given by Sherman individually. The drafts in which he received the loan were made payable to him as cashier. Neither the one nor the other of these documents can prevent the parties from showing as a matter of fact to whom the loan was really made. The defendants were endeavoring throughout the cause, contrary to the form of the note, to show that it was really the obligation of the bank, and that the loan was made to the bank. This they had a clear right to do, as the plaintiffs had an equally clear right to show the contrary" (p. 24).

Applying the principle of these cases to the case at bar, —

1. To the two offers: the fact in question was whether there was a deposit at the time of certification — a deposit was shown, an overdraft was shown; it was clearly competent to show that the overdraft was an agreed loan of such a nature that it did not exhaust the deposit.

2. To the conversation: a deposit having been made, it was clearly a part of the transaction to show that it was made under an agreement that it should be applied to certifications.

C.

The offers were admissible as specifically bearing upon the question of criminal intent and negativing it.

The statute of July 12, 1882, section 13, provides that whoever wilfully violates the provisions of section 5208 shall be punished.

(a) Criminal intent is a necessary element of a criminal offence, and must be proved.

The general principle is laid down in the maxim "*Actus non facit reum nisi mens sit rea.*"

Lord MANSFIELD laid down the proposition in *Woodfall's Case*, 20 St. Tr., at p. 919, that—

> "Where an act in itself indifferent becomes criminal in doing with a criminal intent, then the intent

must be proved and found; but where the act is itself unlawful, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent."

In the recent case of *Queen* v. *Tolson*, 23 Q.B.D. 168, where all the English cases are examined, Mr. Justice WILLS said, —

"It is, however, undoubtedly a principle of English criminal law that, ordinarily speaking, a crime is not committed if the mind of the person doing an act in question be innocent. 'It is a principle of natural justice, and of our law' says Lord KENYON, C.J., 'that *Actus non facit reum nisi mens sit rea*. The intent and act must both concur to constitute a crime.' *Fowler* v. *Pudget*, 7 T.R. 509, 514. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common and statute law, but *it must at least be an intention to do something wrong*."

It is true that, in cases of express prohibition by the law, in some jurisdictions, it is held that knowledge or guilty intent is not an essential ingredient in the offence and need not be proved, such as cases of selling adulterated milk, as *Com.* v. *Farren*, 9 Allen, 489; admitting minors to a billiard saloon without the written consent of their parents or guardian, as *Com.* v. *Emmons*, 98 Mass. 6, 8; receiving lunatics into an unlicensed house, as *Reg.* v. *Bishop*, 14 Cox, 404. But this construction should not be placed upon a statute unless its wording imperatively requires it. See *Reg.* v. *Tolson*, *supra*.

Even in cases of express prohibition it has been held in

many jurisdictions that a criminal intent must be proved, and that evidence negativing such intent is clearly admissible.

Cutter v. *State*, 36 N.J. Law, 125.

This was an indictment for taking an illegal fee, the statute in this case providing that no justice should receive a fee except such as was allowed by the laws of the state, and any justice so doing should be punished.

The court, by BEASLEY, C.J., fully discuss the question, and say that the words of the statute are not to be taken literally, but that mistake, inadvertence, or insane delusion would excuse (p. 126).

> "In morals, it is an evil mind which makes the offence, and this as a general rule has been at the root of criminal law. The consequence is that it is not to be intended that this principle is discarded merely on account of the generality of statutory language. It is highly reasonable to presume that the law-makers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it. And it is this presumption that fully justifies the statement of Mr. Bishop 'that a statute will not generally make an act criminal, however broad may be its language, unless the defendant's intent concurred with his act.' (1 Crim. Law, § 80.)
>
> "This doctrine applies with full force to the present case. If the magistrate received the fees in question without any corrupt intent, and under the conviction that they were lawfully his due, I do not think such an act was a crime by force of the statute above recited.
>
> "But it is further argued on the part of the prosecu-

tion that, as the fees to which the justice was entitled are fixed by law, and as he cannot set up as an excuse for his conduct, his ignorance of the law, his guilty knowledge is undeniable. The argument goes upon the legal maxim, *Ignorantia legis neminem excusat.*

"But this rule, in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions.

"Where the act done is *malum in se*, or where the law which has been infringed was settled and plain, the maxim in its rigor will be applied; but where the law is not settled or is obscure, and where the guilty intention, being a necessary constituent of the guilty offence, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied. To give it any force in such instances would be to turn it aside from its rational and original purpose and to convert it into an instrument of injustice. The judgments of the courts have confined it to its proper sphere. Whenever a special mental condition constitutes a part of the offence charged, and such condition depends on the question whether or not the culprit had certain knowledge with respect to matters of law, in every such case it has been declared that the subject of the existence of such knowledge is open to inquiry as a fact to be found by the jury.

"This doctrine has often been applied to the offence of larceny. The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defence if he can show in a satisfactory

manner that, being under a misapprehension as to his legal rights, he honestly believed the article in question to be his own."

The court cites —

Rex v. *Hall*, 3 C. & P. 409;
Reg. v. *Reed*, Car. & M. 306;
People v. *Whaley*, 6 Cow. 661;
Com. v. *Bradford*, 9 Metc. 268;

and says, after stating that there was a very general opinion that the officer had a right to exact these fees, —

"The prevalence of such an opinion could not, it is true, legalize the act of taking such fees, but its existence might tend to show that the defendant, when he did the act with which he stands charged, was not conscious of doing any wrong."

This view has been adopted in cases of illegal voting by a minor, —

Gordon v. *State*, 52 Ala. 308, —

in an indictment for illegally voting when not of age. The defendant offered to show that his mother and sister had frequently told him that he would be twenty-one the August before election. The court refused to charge the jury that if defendant honestly believed he was of full age he should not be convicted, if the evidence convinced the jury he was not twenty-one.

BRICKEL, C.J., in giving the opinion, said, "The criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence,

relieves the act of criminality;" and further cited the illustrations of an obscene publication sold innocently by a blind man; a counterfeit bill passed by one ignorant of its spuriousness; and cited —

Duncan v. *State*, 7 Humph. 148, —

where "a statute imposed a penalty on the owner or captain of a steamboat receiving and transporting any colored person without having particular evidence that such person was free. The penalty could be inflicted only on the captain or owner who knowingly transported such person. If the person of color without the knowledge or consent of the captain or owner entered the boat, concealing himself, and was thus carried away, the penalty was not incurred."

Affirmed in *Carter* v. *State*, 55 Ala. 181.

So, where parties destroy a house in the mistaken belief that it in law belongs to one of them, it was held that the defendant was not guilty.

Reg. v. *Langford*, Car. & M. 602.

In *State* v. *McDonald*, 7 Mo. App. 510, it was held that a street-car conductor who forcibly ejects a passenger from the car, under the honest belief that the passenger's fare had not been paid, is not liable to criminal prosecution for the assault; the court citing instances of passing counterfeit money without knowledge of its spuriousness, and killing a midnight intruder by a householder with an honest belief that nothing else will save his life or property.

In many jurisdictions in cases of liquor sales to minors or drunkards, if the dealer has made proper inquiry and is misled, he will be protected by such mistake.

Crabtree v. *State*, 30 Ohio State, 382.
Adler v. *State*, 55 Ala. 16.
Faulks v. *People*, 39 Mich. 200.

That the offers and conversation as to the application of deposits tend to show that there was a sum on deposit within the meaning of the statute, has been already considered.

(b) If the offers and conversation as to the application of deposits are not absolutely conclusive in showing that there was a sum on deposit, they at any rate show that the defendant believed that there was a sum on deposit, and had reasonable grounds for such belief, and such grounds negative criminal intent.

Baron PARKE has laid down, as a legal principle, that —

"The guilt of the accused must depend on circumstances as they appeared to him."

Reg. v. *Thorburn*, 1 Den. C.C. 387.

How did the circumstances appear to Mr. Potter?

The question at issue being whether there was a sum on deposit at the time of certain certifications:

There was a debit balance; by agreement between the bank and Mr. Evans this was a loan by overdraft, the same as if it were an independent loan.

There was a sufficient deposit made; there was a certification.

The defendant knew the statutes about certification.

The defendant knew about the debit balance, and that it was an agreed loan.

The defendant knew that a deposit had been made, and that it was to be applied to the certifications by agreement.

The defendant knew about the certification.

There is here no ignorance of statutory law, which excuses no one.

The case is totally different from that of —

United States v. *Reynolds*, 98 U.S. 145;
Scales v. *State*, 47 Ark. 476, —

where it is held that if a man believes that to be right which the law pronounces wrong, and accepts it as duty to do what the law holds to be a crime, the mistake does not free him from guilt. The first case is that of a Mormon who married a second time, notwithstanding the statute against bigamy. The second case is that of a Seventh Day Baptist who worked on Sunday notwithstanding the state law against laboring on the Lord's Day.

In both of these cases the defendants knew the law and believed it to be their duty not to comply with it.

In the case at bar the defendant knew the law, intended to comply with it, and believed he was complying with it.

The ignorance in this case, if it be ignorance, is as to the meaning and construction of the word "deposit." That is ignorance as to a fact, or at least as to a mixed question of law and fact.

A sufficient deposit had been made, but the Circuit Court said, notwithstanding this deposit had been made, as a matter of law the minute it was put in it was gone, and you cannot show that before it was put in you agreed it should

be applied to certifications, or that you agreed that the debit balance should be an agreed loan.

Even assuming that the view of the Circuit Court is correct, here is a mistake not as to the statutory law, but as to a subsidiary matter, to the construction of the law of application of credits to debits.

An honest mistake as to the application of credits to debits ought to negative any criminal intent in an action which is based upon a mistaken view as to such application.

(c) The offers as to defendant's belief in his right to certify checks under the circumstances stated as set out in assignments of error 12, 13, and 14 should have been admitted in evidence on the question of intent, and the requests for ruling based on these offers contained in assignments of error 33, 34, 35, 36, 44, 45, and 55 should have been given.

See cases of mistake and honest belief, above cited, under "criminal intent."

Such criminal intent may be gathered or disproved not only from circumstantial evidence, but a party doing an act which is criminal or otherwise, according to the intent or purpose with which it was committed, will, if a competent witness, be allowed to testify as to what was his actual purpose in doing the act.

Fenwick v. *State*, 63 Md. 239.

Fisk v. *Inhabitants of Chester*, 8 Gray, 506.
People v. *Baker*, 96 N.Y. 340.
Lombard v. *Oliver*, 7 Allen, 155, 157.
Roddy v. *Finnegan*, 43 Md. 490.
Hale v. *Taylor*, 45 N.H. 405–407.
Wheeldon v. *Wilson*, 44 Me. 1–18.

In *Fenwick* v. *The State*, 63 Md. 239, a person on trial for assault with intent to murder was permitted to testify as to the purpose for which he procured the instrument with which he committed the assault; the court saying (p. 241), —

> "As already intimated, there seems to be no sound reason for the exclusion of such testimony where the intent is material to the determination of the question involved, and the witness necessarily has knowledge of such intent, and no case can be cited where such testimony has been excluded when the witness competent to testify in the case is, from his peculiar position, cognizant of the intent, and that intent is directly pertinent to the issue."

In *Fisk* v. *Inhabitants of Chester*, 8 Gray, 508, the Supreme Court of Massachusetts said, —

> "Before parties were made competent witnesses it was the practice to prove their intent by a variety of circumstances, because no man can know the secret purposes of a man's heart except himself. But now that parties are made competent witnesses, it necessarily follows that they may testify to any facts material to the issue."

(d) Whatever may be the law as to criminal intent where the statute does not contain the word "wilfully," where it does the law is clear. The somewhat overworked maxim that every one is presumed to know the law has no application to crimes where a specific intent is part of the crime. We must see whether the required intent exists. The ordinary interpretation of the word "wilfully" in criminal law, that is, that it means a bad purpose, should be given to the word.

To constitute the crime of larceny, for instance, *animus furandi* is necessary. One who takes a chattel believing he has a right to, though he knows all the facts and his belief is based on an absurdly mistaken view of the law, is not guilty of larceny.

State v. *Walz*, 52 Iowa, 227, —

where evidence was admitted that the defendant had been told that the property belonged to the person with whom he was acting.

See also, to the same point, —

Com. v. *Stebbins*, 8 Gray, 492.
Brown v. *State*, 28 Ark. 126.
Butler v. *State*, 3 Tex. App. 403.

So, where a person erroneously believes that money he has found became his own by the finding:

Reg. v. *Reed*, Car. & M. 306, —

where COLERIDGE, J., said, —

> "Ignorance of the law cannot excuse any person; but at the same time, when the question is with what intent a person takes, we cannot help looking into their state of mind, as, if a person takes what he believes to be his own, it is impossible to say he is guilty of felony."

In *Dye* v. *Com.*, 7 Gratt. 662, an act to punish malicious trespass was held not to apply to cases where a claim of right is made to property.

The usual object of inserting the word "wilfully" in a statute is to require a bad purpose or an evil intent as a necessary element of the crime.

The leading case on this point is *Com.* v. *Kneeland*, 20 Pick. 206, an indictment for wilfully blaspheming the holy name of God. SHAW, C.J., said (p. 220), —

> "The word 'wilfully,' in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose, and in this statute must be construed to imply an intended design to calumniate and disparage the Supreme Being, and to destroy the veneration due to him."

This definition has been adopted not only by many other courts, but by the Supreme Court of the United States itself; so that the question here discussed is one upon which this court has already expressed its opinion.

Felton v. *United States*, 96 U.S. 699, was an action brought by the United States against "Felton & Stone, distillers of spirits, to recover the penalty of $1000 prescribed by this act, upon the alleged ground that they

'knowingly and wilfully' omitted, neglected, and refused to construct and maintain pipes and other apparatus connecting the receiving cisterns in their distillery with the outlet of the worm and condenser, in such manner as to prevent the abstraction of spirits while passing from the outlet back to the still and doubler, contrary to the form of the statute in such case provided. The defendants pleaded not guilty in 'manner and form as alleged,' and denied every allegation of the declaration."

> "On the trial it appeared that, the still of the defendants having become worn and defective, a new one was made and placed in their distillery, which proved to be too large for the capacity of the low-wine receiver, and that on the 18th of June, 1872, the low wines in it began to overflow; that the defendants and their servants were ignorant of this want of capacity of the receiver until it was too late to remedy it for the distillation then taking place, and that there was no course left for them but to let the wines overflow and run to waste, or to catch them, and secure their benefit to the government and themselves by dumping them into the vats for redistillation. The receiver was a part of the apparatus by which the low wines were carried from the try-box back to the doubler."

Among other instructions to the jury, the court was requested to give the following: —

> "That if the inadequacy of the low-wine cistern was unknown to the defendants and their superintendent until too late to prevent the overflow, and that then the superintendent, in the exercise of his best judgment, acting in good faith, drew off the wines and dumped

the same into the vats for redistillation, the defendants were not liable."

The court refused to give this instruction. The jury found a verdict for the plaintiff. This court, in reversing a judgment entered on this verdict, said, Mr. Justice FIELD delivering the opinion, at page 702, —

"The evidence failed in an essential particular. So far from showing or tending to show that, when the new still was made and placed in the distillery, the defendants, or any of their servants, had any knowledge of the incapacity of the receiver to hold all the wines that might be distilled on any day, it showed their ignorance of the defect until it was too late to remedy it for the distillation then taking place. There was, therefore, the absence of that knowledge which could render the neglect wilful, and therefore actionable. They must have 'knowingly and wilfully' omitted to furnish a receiver of sufficient capacity before the severe penalty prescribed could be imposed upon them and their distilled spirits subjected to forfeiture. Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "wilfully,"' says Chief Justice SHAW, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i. sec. 428.

"If the record were silent as to the want of knowl-

> edge of the superintendent, it would be presumed from his connection with the distillery that he knew the still was too large for the capacity of the receiver; and from his knowledge similar knowledge would be imputed to his principals. Parties are presumed to be acquainted with the utensils and machinery used in their business, and of course with their character and capacities. But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."

Again, in construing Revised Statutes, section 5209, the Supreme Court, in its latest case upon this section, *Evans* v. *United States*, 153 U.S. 584, 594, have said in reference to the words "wilfully misapplied,"—

> "In fact, the gravamen of the offence consists in the *evil design* with which the misapplication is made, and a count which should omit the words 'wilfully,' etc., and 'with intent to defraud' would be clearly bad."

The question was also fully and ably considered in *United States* v. *Three Railroad Cars*, 1 Abb. U.S. 196.

That was an information on section 5 of act of June 27, 1864, which provides that "If any unauthorized person or persons shall wilfully break," etc., "any wire, seal," etc., "attached to any vessel, car," etc., he shall be punished. The information did not allege that such seals were re-

moved wilfully. The answers admitted material facts, but set up that the seals were removed by mistake.

At the trial the jury returned a special verdict that the seals were removed, but in ignorance of their character and purposes, and without knowing by whom or why or for what purpose they had been placed on the cars. They were removed to make the fastening of said cars more secure, without any improper or illegal motive or intention.

The court say in regard to the meaning of the word "wilfully" (p. 202), —

> "The definitions given by our best lexicographers, as well as the authority of legal writers, show that *wilfully* is ordinarily used in a bad sense. Webster, whose definitions are most reliable, gives as the proper definition of '*wilful*,' in its present use, 'governed by the will without yielding to reason, obstinate, perverse, inflexible, stubborn, refractory;' and he gives as the definition of 'wilfully,' 'in a *wilful* manner, obstinately, stubbornly.'
>
> "Upon the best consideration I have been able to give to this case and to the authorities which my researches have discovered, I am quite confident that neither the evidence nor the special verdict will justify the conclusion that the removal of the seals of the consul, as found by the verdict, was wilful within the meaning and intent of the act of Congress.
>
> "It is true that a person who deliberately does an act which he knows to be unlawful, or wrongful, is generally held to have done it wilfully; and the familiar doctrine that a person is conclusively presumed to know the law of the country of his domicile or temporary sojourn, was pressed upon the court for

the purpose of bringing this case within the principle of the cases in which this doctrine has been applied. Without considering the question whether the regulations presented by the secretary of the treasury, under an act of Congress, are to be considered as laws, it must be observed that in all cases of this kind the intention of the legislature is to govern; and that when, as in this case, the act must be *wilfully* done to make it criminal, it can hardly be supposed that the legislature intended to declare an act committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper, to be a felony punishable, in the discretion of the court, by a large pecuniary fine and five years' imprisonment. Indeed, under such proof of the absence of all criminal or improper intent or feeling, eminent judges have directed acquittals in cases where the punishment authorized was much less severe."

In criticising an early case decided on circuit by TANEY, C.J., the court continued (p. 205), —

"This decision of the chief justice, and others which serve to sustain to some extent the position of the district attorney, were doubtless based upon the maxim that 'Ignorance of the law excuses no one,' and in accordance with which a party is legally presumed to know what the law is, even when the question depends upon the intent and meaning of an act of Congress of which he has never heard, and in regard to which the opinions of judges and lawyers are not only in opposition but almost equally divided; and it can hardly be doubted that the term *wilfully* is sometimes, if not generally, introduced into criminal and penal statutes to

prevent the gross injustice that might otherwise be perpetrated in the strict application of the rule, which requires this legal presumption in opposition to the real truth of the case."

The court further says, at page 203, —

"In the case of *United States* v. *Hart*, Pet. C. Ct. 390, Mr. Justice WASHINGTON held that a constable who stopped and detained the mail coach, by arresting the driver because he was driving through the streets of Philadelphia at a speed which was considered dangerous to the persons of its citizens, was entitled to a verdict of not guilty on an indictment founded upon a statute making it criminal for any person 'knowingly and wilfully to obstruct or retard the progress of the mail;' — the judge holding that driving at a dangerous speed, upon the streets of the city, was a breach of the peace and an offence at common law, and authorized an arrest of the offender without a warrant; — and that it could not therefore be said that the act was a *wilful* stopping of the mail; — and this decision was referred to and approved by Mr. Attorney General CRITTENDEN, in an opinion furnished the Postmaster General in 1852."

In other decisions of United States Courts the same view has been taken.

In *United States* v. *Smith*, 27 Fed. Rep. 854, DICK, District Judge, said (p. 856), —

"Whenever a statute positively forbids an act, the doing of such act *wilfully*, or from culpable negligence, is an indictable crime. A *wilful* act is one that is done,

> not only voluntarily, but for a bad purpose. When such purpose is shown by the evidence, the law implies a criminal intent. The accused cannot say, by way of defence, that he did not know the law and did not intend to violate it. When an act forbidden by law is knowingly done, but not with a bad purpose, the presumption of criminal intent is only *prima facie*, and the accused may show that he did not act from an evil motive, and may claim the benefit of the presumption of innocence and the doctrine of a reasonable doubt."

And see, also, *North Carolina* v. *Vanderford*, 35 Fed. Rep. 282, 287.

In England the law is the same:

Smith v. *Barnham*, 1 Ex. D. 419, was an information under statute providing "if any person or persons shall wilfully throw any soil into any part of the said rivers," etc. The appellant was a tanner having premises on a stream. In the course of his business he discharged refuse from his works into it. After giving an opinion in favor of reversing a conviction, BRAMWELL, B., added (p. 423), —

> "Further, I think that the refuse was not 'wilfully thrown in within the meaning of the clause, for it was discharged in the course of carrying on a lawful trade, and, as it appears, in the exercise of a supposed right."

See, also, *Reg.* v. *Holroyd*, 2 Moody & Rob. 339.

So in New York:

Wass v. *Stephens*, 128 N.Y. 123, was an action for malicious prosecution under section 639 of the Penal Code.

which provides that "any person who wilfully *or* maliciously displaces, removes, injures, or destroys . . . a pipe or main for conducting water or gas . . . is punishable by imprisonment for not more than two years."

ANDREWS, J., said (p. 128),—

> "The plaintiff intentionally disconnected the pipes, and, it may be conceded, in so doing violated a right of the defendant. But the word 'wilfully' in the statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness."

Expressions in *Anderson* v. *How*, 116 N.Y. 336, perhaps justifying a broader interpretation, were criticised.

Judge ANDREWS' definition of the meaning of "wilfully" was quoted with approval and made the basis of decision by BARTLETT, J., in delivering the opinion of the court in *Hewitt* v. *Newburger*, 141 N.Y. 538.

So in North Carolina: *State* v. *Whitener*, 93 N.C. 590, was an indictment under statute providing for the punishment of any tenant "who shall . . . wilfully and unlawfully . . . injure or damage any . . . house . . . belonging to his landlord." Defendant removed window sashes on quitting possession. He offered evidence that when he took possession there were no sashes in these windows and he borrowed the sashes from his brother, and when he gave up possession removed them. It seems to have been conceded that, being affixed to the realty, he

had no right of removal. The evidence was excluded. *Held*, error. The court said (p. 592),—

> "The word 'wilful' used in a statute creating a criminal offence, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority — careless whether he has the right or not — in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute. In *The State* v. *Roseman*, 66 N.C. 634, where the defendants were indicted for unlawfully and *wilfully* demolishing a public school-house, and they offered some evidence of their possession under a person who claimed title to the *locus in quo*, which was rejected by the court, READE, J., speaking for this court, said, 'If the defendants were in the adverse possession of the school-house, and *bona fide* claiming it as their own, it certainly was not a *crime* in them to pull it down. It was important, therefore, for them to prove that fact, for the words of the statute are "unlawfully and *wilfully*" demolish, etc. Upon the supposition that the record which was offered and rejected was not sufficient evidence of title upon an issue directly involving title, it was certainly evidence tending to explain the possession of the defendants, and the *bona fides* of what they did.'"

The court also cited —

State v. *Hanks*, 66 N.C. 613.
State v. *Ellen*, 68 N.C. 281.
State v. *Crossit*, 81 N.C. 579.

So in Wisconsin:

State v. *Preston*, 34 Wis. 675 —

was an action to recover a penalty under a statute forbidding the wilful obstruction of a highway. The defendant obstructed the highway, but, evidence having been rejected which showed that he acted under a claim of right, the conviction was reversed. DIXON, C.J., said (p. 683), —

> "For the plaintiff it is contended that the term '*wilfully*,' as here used, signifies no more than *voluntarily* or *purposely*, — thus distinguishing the act of obstructing made penal, from one which may be said to have been *accidental*, which last alone it was the design of the statute not to punish. The word 'wilfully,' as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning, or degrees of intensity, according to the context and evident purpose of the writer. It is sometimes so modified and reduced as to mean little more than plain *intentionally* or *designedly*. Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in greater or less degree, that is, as implying an evil intent without justifiable excuse.
>
> "1 Bishop on Criminal Law, sec. 421."

This was approved and followed in —

State v. *Smith*, 52 Wis. 134.

So in Texas:

Owens v. *State*, 19 Tex. App. 242 —

was an indictment under statute forbidding wilfully driving stock from its accustomed range. The trial judge in his charge said (p. 249),—

> "By 'wilfully' as used in this charge is meant that the act was done without reasonable ground to believe the act of taking was lawful."

This was held correct, the court citing numerous Texas cases to this effect.

And see, to the same effect, —

Yookum v. *State*, 21 Tex. App. 260;
Finney v. *State*, 29 Tex. App. 184;
State v. *Alcorn*, 78 Tex. 387, —

where numerous cases are cited, the decision of the court being based on *Com.* v. *Kneeland*, 20 Pick. 220, and *Felton* v. *United States*, 6 Otto, 702.

And indeed it is wellnigh universally held that the definition of "wilfully" includes an evil intent.

State v. *Gardner*, 2 Mo. 23.
State v. *Hein*, 50 Mo. 362.
State v. *Landoz*, 37 La. An. 376.

These cases make it abundantly clear that in a statute imposing the severe penalties that this statute does, a defendant cannot be held to commit the crime wilfully who acts as he does under a claim of right. Any other construction is both harsh and contrary to the authorities. Further, in this particular statute, the wording is such as to leave the matter entirely free from doubt. The statute of 1869 prohibits certain certifications, but does not make

a breach of this statute a penal offence. The statute of 1882 provides the punishment for one who "wilfully violates" the earlier statute. Now, however possible it might be to argue that a defendant who voluntarily and intentionally, although with innocent intent, certified a check, had wilfully *certified* it, it is certainly impossible to say that such a person "wilfully *violates*" the prohibition. The weakest meaning that can be given to "wilfully," according to any view which we have met with either in the dictionary or in decisions of courts, is "intentionally." "Intentionally violates" can surely mean nothing else than "violates with intent to violate," and to say that a man who is acting under a belief in the rightfulness of his doings is violating a statutory prohibition with intent to violate it, is absurd. It is as contrary to the meaning of the English language as it is believed to be contrary to law to say that such a man "wilfully violates" the prohibition of the statute.

IV. REQUESTS RELATING TO THE WORD "WILFULLY" AND THE JUDGE'S CHARGE ON THIS POINT.

57. The Circuit Court erred in refusing to instruct the jury as follows, as requested by the defendant: —

> "The word 'wilfully' in this indictment means not simply that the defendant certified the checks in question 'voluntarily,' but that he did it with a bad purpose or with an evil intent, and in this case must be construed to imply an intended design to certify the checks in question, or some one of them, when he had no lawful right so to do."

64. The Circuit Court erred in charging the jury as follows: After the judge's charge was given and before the jury retired, the defendant excepted to the following portion of the judge's charge as not being a correct and sufficient statement of the law applicable to the facts charged upon, which are the facts hereinbefore set forth in this bill.

The portion excepted to is as follows: —

> "On the other hand, the position taken by the counsel for the United States is perfectly correct. This statute is a law for the regulation of banking business; its provisions are arbitrary, but are to be obeyed. And yet they are of that character that, while the United States must prove knowledge and wilfulness, it is not necessary that the United States should prove that the defendant was guilty of a corrupt purpose, guilty of moral turpitude, guilty of fraudulent intent, or guilty of an injurious purpose, except so far as the word 'injurious' is a technical word and implied in every unlawful act by force of law. A conviction of an offence under this statute does not imply that the defendant has been guilty of any of those things, although the penalty is so large that there may be an opportunity for considering such things upon hearing the facts pertinent when sentence is pronounced. But here there are no considerations of that character whatever. The offence under this statute may be committed under such circumstances as need not imply any of these things. Certainly it is not for the United States to prove them, and the United States are perfectly right in saying that they are not bound to prove any of these corrupt purposes."

The Circuit Court should have given the instruction requested, and erred in charging the jury that it was "not necessary that the United States should prove that the defendant was guilty of a corrupt purpose."

The act of July 12, 1882, section 13, provides, —

> "That any officer . . . who shall wilfully violate the provisions of . . . section 5208, Revised Statutes, . . . shall be guilty of a misdemeanor."

The Circuit Court has practically limited the word "wilfully" to mean knowingly. It says, to be sure, in its charge that the United States must prove "knowledge and wilfulness," but it nowhere defines "wilfulness" except negatively, as in its charge above quoted.

The plaintiff in error contends that in this statute the ordinary interpretation of the word in criminal law, that is, that it means a bad purpose, should be given to the word "wilfully."

The authorities and arguments on this point have already been submitted in dealing with the questions raised by rejection of evidence.

V. THE SIX CHECKS, AND THE CERTIFICATION THEREOF ON JULY 23 AND 24, OUTSIDE OF THE FIVE CHECKS CONTAINED IN THE INDICTMENT, SHOULD NOT HAVE BEEN ADMITTED.

The government offered in evidence other checks than those in the indictment, dated July 23, 24, and 25, 1891, being five checks on July 23, three checks on July 24, and five checks on July 25, all checks of Irving A. Evans &

Company, and all certified by the defendant, thirteen in all, on the ground that they were the acts of the defendant, and assisted in proving, or had a tendency to prove, knowledge on the part of defendant as to the condition of that account, the amount of deposits or overdraft.

The defendant objected to their admission on the ground that they were an attempt to prove other acts which might or might not be in connection with the accounts of the same day, which might or might not be criminal in their character, and on the ground that they were irrelevant to the proposition touching knowledge and intent in the certification of the checks that are included in the indictment, and, being other substantive facts and occasions, they are not admissible for the purpose for which they are offered; and also that they could only be admissible as proof of other transactions which would require the same proof under the statute that the facts existed which would make the certification of each individual check a criminal offence, as applied to the certification of the checks set forth in the indictment.

The court said that he would put the responsibility upon the United States, and admitted the above certification of checks in evidence, so far as they were certified before Exhibit E, on July 25, 1891.

The defendant excepted for the above reasons, and the above checks as certified, six in number, Exhibits 37, 38, 39, 40, 41, 43, that were certified on July 23 and 24, 1891, were read in evidence (Record, pp. 126, 127; Assignment in error 7, Record, p. 171).

The admission of these checks and their certifications was error in that it did not conform to the general rule that similar but disconnected facts are not admissible, but are irrelevant.

That one crime is not admissible to prove another, see

People v. *Sharp*, 107 N.Y. 427.
Snapp v. *Com.*, 82 Ky. 173.
Com. v. *Jackson*, 132 Mass. 16.

The checks do not come within any of the well-defined exceptions to the general rule.

In cases of fraud, evidence of other acts of a kindred nature are held admissible to show fraudulent intent or knowledge.

Wood v. *United States*, 16 Pet. 342.
Castle v. *Bullard*, 23 How. 172.
Lincoln v. *Claflin*, 7 Wall. 132–138.

The contention of the government in this case is that no fraud need be proved, that it is not an essential element of the case, that "wilfully" means simply designedly or knowingly, and they are not offered on the ground of fraud, but that they had a tendency to prove knowledge on the part of the defendant as to the condition of Evans' account, the amount of deposits or overdraft.

It is difficult to see how they have any tendency whatever to prove knowledge.

Of themselves they are indifferent acts. In order to make crimes of them, two other ingredients of crime must be shown; namely, that there was not a deposit at the time each of these checks was certified, and that each certification was a wilful violation of the statute.

If we admit that similar crimes would be admissible to prove that the act in question was a crime, the jury would be obliged in each instance to receive extraneous evidence that these acts were crimes, and to pass upon this question.

And in the present case no such evidence was offered. To admit such evidence would be practically trying six more cases in connection with the present case.

Counsel have found no cases where such evidence, requiring affirmative findings of the jury to create the evidence offered, crimes, has been admitted. There have been numerous cases where other crimes have been received in evidence on the question of fraud or knowledge, but none where the question of whether the act offered was a crime has had to be considered by the jury in order to make the act admissible as a crime to prove knowledge or intent.

In *Com.* v. *Jackson*, 132 Mass. 16, in a well-considered opinion, the court say, at p. 20, —

> "Evidence of the commission of other crimes by a defendant may deeply prejudice him with the jury, while it does not legally bear upon his case. . . .
>
> "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defence, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

In *Boyd* v. *United States*, 142 U.S. 450, in an indictment for murder which followed an attempt to rob, evidence tending to show that the prisoner had committed other robberies in that very neighborhood on different days shortly before the time when the killing took place, was

excluded; the court holding, at page 458, that such evidence was collateral to the issue, afforded no legal presumption or inference as to the crime charged, and was prejudicial.

(a) The certification of the two checks admitted in connection with the conversations with Bliss. (Record, p. 126.)

The certification of two checks in connection with the conversation with Bliss sometime in the month of July was immaterial and incompetent. They are not only remote, but are open to the same objections that are applicable to the admission of the certification of the six checks just previously discussed.

VI. THE BURDEN OF PROOF WAS ON THE GOVERNMENT TO ESTABLISH BEYOND A REASONABLE DOUBT EVERY POINT ESSENTIAL TO THE PROOF OF THE CASE.

The court erred in its charge as to the burden of proof. Assignment of Error No. 63 (Record, pp. 187, 188), is as follows: —

63. The Circuit Court erred in charging the jury as follows: —

The defendant excepted to that portion of the judge's charge regarding the burden of proof being on the defence to show that a separation or [illegible] sits was made to certify against, the defendant's contention being that the burden of proof was upon the government to

establish beyond a reasonable doubt every point essential to the proof of the case.

That portion of the judge's charge excepted to on this point is as follows: —

> "But, upon some reflection, I have come to the conclusion that, notwithstanding Evans & Company may have been overdrawn on the morning of any particular day, and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain checks or other moneys, and hold them for the purpose of covering the certified checks, that it would not be any violation of the letter or policy of the statute, and would be a defence. But I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable to see in the case any evidence, — I do not mean to say evidence of what was intended or agreed to be done, which is not essential to this case, — but any evidence that, as a matter of fact, any of these checks deposited by Evans & Company did not go into the general deposit account, and were not absorbed the instant they passed into the bank. Upon this branch of the case I instruct you the burden of proof is on the defence. Not proof beyond a reasonable doubt, but to satisfy you by a preponderance of evidence. If the defence does satisfy you by the preponderance of evidence that there was a segregation in fact, appearing upon or shown from the books and papers of the bank, a segregation, a setting apart of certain deposits sufficient to cover the certified checks, and against which the checks were certified, it is a defence in this case." (Bill of Exceptions, Record, p. 165.)

No complaint is made here because the judge said he saw no sufficient evidence of any actual segregation of certain deposits to meet certifications, thus instructing the jury as to what his view of the facts was, but the question was one of fact, and the way the deposit slips were made out, the way deposits were made and entered on pads, and the books of the bank, were in evidence. It was the right of the defendant, guaranteed by the Constitution, to have the jury pass upon the question of his guilt or innocence, and this involved a determination by them under proper instructions of whether Evans & Company had money on deposit, which in the view of the law taken by the court, depended on the further fact of the actual segregation of certain deposits.

This question of fact was left to the jury under erroneous instructions as to the burden of proof. The government was bound to make out its whole case beyond a reasonable doubt. Part of its case was that Evans & Company had no money on deposit. Evans & Company did have money on deposit, in the court's opinion, if certain checks were segregated. Evidence of such segregation, therefore, directly negatived the government's evidence that Evans & Company had no money on deposit, and when all the evidence was in it was the duty of the jury to acquit the defendant unless the government had convinced them, beyond a reasonable doubt, that there was no money on deposit when the checks were certified.

Further, this erroneous instruction as to the burden of proof was likely to mislead the jury as to other matters. It could hardly fail to make them believe that the burden of proof as to other parts of the case might shift back and forth, instead of remaining on the government throughout the case.

The burden of proof is upon the government in a criminal case to establish beyond a reasonable doubt every point essential to the proof of the case.

Lilienthal's Tobacco v. *United States*, 97 U.S. 237, 266.

In this case Mr. Justice CLIFFORD says, at page 266, —

> "In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment."

And cites the following cases: —

Com. v. *McKie*, 1 Gray (Mass.) 61.
Com. v. *York*, 9 Metc. (Mass.) 125.
Com. v. *Webster*, 5 Cush. (Mass.) 305.
Com. v. *Eddy*, 7 Gray (Mass.) 584.
Bennett & Heard, Lead. Crim. Cas. 299.

In the first of these cases, BIGELOW, J., said, —

> "The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the government to prove beyond a reasonable doubt the offence charged in the indictment, and if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. This results, not only from the well-established principle that the presumption of innocence is to stand until it is overcome by proof, but

> also from the form of the issue in all criminal cases tried on the merits, which, being always a general denial of the crime charged, necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient which the law requires in order to constitute an offence. If the act charged is justifiable or excusable, no criminal act has been committed, and the allegations in the indictment are not proved. And this makes a broad distinction in the application of the rule of the burden of proof to civil and criminal cases. In the former, matters of justification or excuse must be specially pleaded in order to be shown in evidence, and the defendant is therefore, by the form of his plea, obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof; while in the latter, all such matters are open under the general issue, and the affirmative, namely, proof of the crime charged, remains in all stages of the case upon the government."

The true rule, and that supported by the best modern decisions, we believe to be, that in a criminal case (not including actions or informations for forfeitures or penalties and the like), tried on the issue raised by a plea of "not guilty," the government must make out that the defendant was guilty beyond a reasonable doubt, and this burden is not sustained if the defendant, by any evidence of any kind, raises a reasonable doubt that he was not guilty. He should never be required to do more than that.

This is well-settled law in New York.

In *People* v. *Downs*, 123 N.Y. 558, FINCH, J., says (p. 564), —

> "We have decided so recently as to make further citation needless that the rule that in criminal cases the defendant is entitled to the benefit of a reasonable doubt applies not only to the case as made by the prosecution, but to any defence interposed.
>
> "*People* v. *Riordan*, 117 N.Y. 71."

In Massachusetts, —

> *Com.* v. *Heath*, 11 Gray, 303.
> *Com.* v. *Pomeroy* (rulings and charge of GRAY, C.J., and MORTON, J.), reported in Wharton on Homicide, 2d ed. 753, 754, 756.

And in many other states, —

> *Kent* v. *People*, 8 Col. 563.
> *Dacey* v. *People*, 116 Ill. 555.
> *People* v. *Garbutt*, 17 Mich. 9 (opinion by COOLEY, C.J.).
> *State* v. *Crawford*, 11 Kan. 32.
> *State* v. *Jones*, 50 N.H. 369.
> Bishop Criminal Proc., secs. 1048–1051.

We believe that this rule is without exception, and that the cases above cited establish that contention, but if there is an exception to the rule it only goes as far as this: that a "distinct substantive ground of defence," such a defence, in other words, as would, in a civil case, require an affirmative plea, must be proved by the defendant by a prepon-

derance of evidence. By far the most common of such defences is that of insanity.

Surely it needs no argument to show that the "segregation of checks" was not such a "distinct substantive ground of defence," but merely evidence tending to show that Evans & Company had money on deposit. The indictment necessarily contained the allegation that that firm had no money on deposit. The question at the trial was whether that allegation was true. The books of the bank, the methods of business, the segregation of checks, if any, all are evidence on that point. The defendant does not seek, as by a plea in confession and avoidance, to admit the allegation in the indictment, and avoid it by setting up a further fact. He seeks rather, as by a traverse, to show that, in spite of the government's evidence tending to prove the contrary, there was money on deposit.

Deposits larger than the amount of the certifications were received. The court ruled that it would be a defence if moneys or checks were received and set aside for the purpose of covering the certified checks, but that the burden of proof was on the defence to prove this by a preponderance of evidence.

If the deposits were set aside, there was a deposit, and the defendant was not guilty: if they were not set aside, there was not a deposit, and the defendant was guilty; and by its ruling the court held that the defendant must show that there was a deposit, instead of holding that the government must show that there was not a deposit.

This is clear error, and the verdict and judgment should be set aside for this ground alone.

VII. THE DEFENDANT CANNOT BE SENTENCED UPON A CONVICTION OF THE SAME OFFENCE THREE TIMES BY THE SAME VERDICT, THE RECORD SHOWING THAT THE THREE CONVICTIONS UPON EACH SET OF EIGHT COUNTS WERE FOR ONE AND THE SAME OFFENCE.

The Circuit Court has erred in its judgment entered April 22, 1893, in said cause, in sentencing the defendant, as neither the record nor the verdict of guilty, severally rendered upon each of the following counts: 1, 3, 7, 9, 11, 15, 17, 19, 23, 25, 27, 31, 33, 35, 39, warranted or authorized the infliction of any sentence, or constituted a valid conviction under the laws of the United States.

The record and bill of exceptions show that counts 1, 3, and 7 were based upon and severally charged the unlawful certification of a single check numbered 54,493, dated Boston, July 23, 1891, drawn by Irving A. Evans & Company upon the Maverick National Bank, payable to the order of Hayward & Townsend, for the sum of $2450. (Record, pp. 114, 115.)

As to these three counts, the record and bill of exceptions show that the defendant has been found guilty three different and distinct times of certifying one and the same check. The defendant claims it is impossible for the defendant to be guilty three times of the same offence upon the same check in this class of offences, and it is error for the court to select either of said counts, or all three, and attempt to sentence thereunder.

A similar state of facts is true, and similar objections

taken, in regard to counts 9, 11, 15, counts 17, 19, and 23, counts 25, 27, 31, and counts 33, 35, and 39, being all of the counts upon which a conviction was had, and the same arguments applicable to counts 1, 3, and 7 are equally applicable to each of the above sets of three counts. (Record, p. 115.)

1. The verdict in this case is a partial verdict, the defendant having been found guilty on fifteen counts, and not guilty on twenty-five counts. (Record, p. 167.)

> "The verdict in a criminal case is either general on the whole charge, which the jury are at liberty to find in all cases, both upon the law and fact of the case, or partial as to a part of the charge, as where the jury convict the defendant on one or more counts of the indictment and acquit him of the residue." . . .
>
> Heard, Criminal Pleading, 300.
> Archbishop, Criminal Pleading, 176, 19th ed.

> "And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."
>
> Opinion in *Claassen* v. *United States*, 142 U.S. 146, 147.

The Claassen case was a case of a partial verdict, the defendant having been found guilty on five counts and acquitted on six (p. 141). The five counts on which he was

convicted were, one for embezzlement and four for misapplications.

The court considered the embezzlement count alone, and held that good and the defendant rightly convicted.

There was only one count for embezzlement in the Claassen case.

In the case at bar, we have counts 1, 3, and 7, three convictions for exactly the same offence.

The court in the present case cannot select one of the three counts, and hold that that is good and that the sentence applies upon it.

The jury alone would have been justified in making such a selection.

The counts 1, 3, 7, and each set of three counts, are almost precisely alike, — they charge identically the same offence upon the record. (Record, pp. 114, 115.)

If one is good, they all are good and we have three good convictions of the same offence.

Com. v. *Haskins*, 128 Mass. 60.

In this case the defendant was charged with larceny of a cow in one count, and with receiving the same cow in another count, knowing it to have been stolen. The jury returned a verdict of guilty on both counts.

Defendants moved in arrest of judgment on the ground that the verdict was inconsistent and void, and that no judgment could be rendered on it.

Lord, J., said (p. 61), —

"By that record it appears that there had been the

larceny of a cow, and but one larceny of that cow. . . . It is certain that the defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of a crime of receiving stolen goods which he himself had stolen."

After the verdict the district attorney had *nolle pross'd* one count.

"The record, therefore, notwithstanding the entry of the *nolle prosequi*, shows that the defendants had been convicted by the jury upon both counts; and although, as a legal effect of a conviction upon each count, it cannot be said strictly that it is an acquittal upon the other, yet the finding of guilty upon both is inconsistent in law, and is conclusive of a mistrial. . . .

"After the affirmation of the verdict, when there was no means of knowing of record upon which count the jury intended to convict, as there was no right in them to convict upon both, to assume that the error is corrected by a *nolle prosequi* of either count by the district attorney is to permit the district attorney to determine, instead of the jury, upon which count the defendants were guilty. But the *nolle prosequi* corrects no error, and has no effect upon the record as it stood prior to its entry. The record showed a verdict so inconsistent with itself, and so uncertain in law, that no judgment could be entered upon it. The *nolle prosequi* does not change that record, nor make the verdict which the jury rendered any less inconsistent with itself, nor any more certain in law, than it was before such entry."

In the case at bar, the offences are not inconsistent, except as the evidence in the first count in respect to authentication might differ from that in the third or seventh counts in each set of eight counts; but it is submitted that, on principle, a person cannot be convicted three times of committing the same offence. Every case of *autrefois acquit* or *autrefois convict* is an illustration of this.

Assuming that one conviction would have been proper, as the jury has not convicted once but three times, the court, any more than the district attorney, cannot select any one of the three counts and sentence upon it.

In *Com.* v. *Fitchburg Railroad Co.*, 120 Mass. 372–381, the court say, —

> "The jury returned a verdict of guilty upon each of the first three counts. The court are all of opinion that this must be deemed to have been a mistrial. *But one offence was charged*, and the jury should have been instructed to return a general verdict of guilty or not guilty upon the whole indictment as for a single offence, which would have been in conformity with the long and well-established practice in this commonwealth; or they should have been instructed to return a verdict of guilty upon the count proved, if either was proved, and not guilty upon all the others. As the record now stands, the defendant corporation was charged with five distinct misdemeanors, of three of which it was found guilty, and of two of which it was found not guilty. The bill of exceptions, however, shows that but one offence was committed, and it is suggested that a *nolle prosequi* may be entered as to two of the counts, and judgment upon the other. It

> is obvious that, inasmuch as the several counts may be supported by different evidence, and as they are, at least to some extent, inconsistent with each other, it is impossible to determine which was proved, it being certain that all could not have been. The verdict must therefore be set aside."

In *Com.* v. *Lowrey*, 159 Mass. 62, 63, the defendant was charged on indictment in three counts with offences alleged to have been committed on the same day and in the same place, and was found guilty on the first count and not guilty on the residue. He moved in arrest of judgment on the contention that the counts charge but one offence, and that the verdict of not guilty upon the second count is repugnant to the verdict of guilty upon the first.

But the court held that the record did not show that the counts were for one and the same offence, but they may have been for different offences, in which case the verdicts were not repugnant and would warrant judgment; clearly implying that if the record had shown that the counts were for one and the same offence, the record would not have justified sentence.

In the case at bar, the record does show that the three convictions upon each set of eight counts were for one and the same offence. (Record, pp. 114, 115.)

In *Dealy* v. *United States*, 152 U.S. 539, 542, the plaintiff in error's contention was that where a single conspiracy was charged in 17 counts, with a different overt act in each count, an overlooking by the jury of the 16th count was an acquittal on that count, and that there was thus an acquit-

tal on one count and a conviction on 16 counts of the same offence; but the court held that both the conspiracy and the overt act are necessary to create an offence, and that the different overt act in each case made each count a different offence.

The court say, by Mr. Justice BREWER, —

> "Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offence, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

This reasoning of the court clearly implies that if the counts had been for identically the same offence and a verdict of acquittal and conviction of identically the same offence, there would have been a mistrial.

In the case at bar, we have the anomaly of a conviction on three counts and an acquittal on five counts in each series of eight counts — each series of eight counts being for identically the same offence — the same president, the same check, the same certification by the same means. (Record, pp. 114, 115, 167.)

The conclusion seems inevitable that there is error on the record, and that there has been a mistrial.

W. S. B. HOPKINS,
HENRY D. HYDE,
WILLIAM A. SARGENT,
Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ASA P. POTTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 531.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ASA P. POTTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 531.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

Asa P. Potter, president of the Maverick National Bank, of Boston, was indicted in the circuit court of the United States for the first circuit within and for the district of Massachusetts, on the 15th of October, 1892, under section 5208 of the Revised Statutes of the United States as amended by the act of July 12, 1882, section 13, charging him as the president of said bank, a national banking corporation organized under the laws of the United States and located at Boston, with unlawfully certifying five certain checks, drawn by one Irving A. Evans & Co. upon the Maverick National Bank, of Boston.

The indictment contained 88 counts, to each of which the defendant demurred specially and to all of which he demurred generally in certain defined groups.

On October 29, 1892, the court sustained the demurrers as to counts 41 to 64, inclusive, and as to counts 81 to 88, inclusive, and overruled the demurrers to the remaining counts.

At the October term, 1892, the accused, Asa P. Potter, was arraigned at the bar and plead not guilty.

On February 8, 1893, the attorney for the United States entered a *nolle prosequi* as to counts 65 to 80, inclusive. A jury was thereupon impaneled, who, after hearing the evidence and receiving the charge of the court and suffering the argument of counsel, returned their verdict and found the accused guilty on the first, third, seventh, ninth, eleventh, fifteenth, seventeenth, nineteenth, twenty-third, twenty-fifth, twenty-seventh, thirty-first, thirty-third, thirty-fifth, and thirty-ninth counts; and not guilty on the second, fourth, fifth, sixth, eighth, tenth, twelfth, thirteenth, fourteenth, sixteenth, eighteenth, twentieth, twenty-first, twenty-second, twenty-fourth, twenty-sixth, twenty-eighth, twenty-ninth, thirtieth, thirty-second, thirty-fourth, thirty-sixth, thirty-seventh, thirty-eighth, and fortieth counts of the indictment.

On April 19, 1893, the defendant filed his bill of exceptions (pp. 114–162).

On April 22, 1893, judgment was entered against the defendant that he pay a fine of $1,000, and that he be imprisoned in jail for the term of sixty days.

The assignments of error, 66 in number, will be found on pages 168–190, and will be considered in the order in which they are there presented, after disposing of the grounds of demurrer to the several counts.

THE DEMURRER.

(1) The counts were objected to as insufficent in law on the grounds—

> That they, and each of them, set forth the certification of a check, simply by writing upon said check; and failed to set forth any completion of the contract of certification; and failed to set forth any delivery of said certification to any person whatever; and failed to set forth the creation of any contract of certification or liability whatever of the said association upon said check (p. 113).

This objection proceeds upon the ground that to the certification of a check, within the meaning of the statute, there must be a delivery of the check after it is certified by the proper officer; and that the certification and delivery do together create and constitute a "contract of certification" between the bank and the holder of the check.

It is true that the books do speak of the "delivery" of the check, as that "delivery is essential to complete certification and to create liability of the bank upon it." (1 Morse on Banking, 3d ed., sec. 405.) But regard must be had to the character of the transaction there spoken of and to the different conditions under which checks are presented for certification. The author is speaking of checks which are presented for certification by the holders for value, drawees, or transferees, or indorsees.

In *Florence Mining Company* v. *Brown* (124 U. S., 391) this court said:

> A check upon the bank in the usual form, not accepted, or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder. It is simply an order, which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment.
>
> By certifying a check the bank becomes the principal and only debtor—the holder, by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer, and the check then circulates as the representative of so much cash in the bank, payable on demand to the holder. (2 Daniel on Negotiable Instruments, 4th ed., sec. 1601*a*.)

As between the holder for value of a certified check and the bank which has certified it, the relation is different from that which subsists between the drawer of a check and the bank which has certified it at his request.

> Frequently a depositor procures his own check to be certified before he offers it in payment. In such cases it does not lose its character as a check in any particular. It only has the additional credit imparted to it by the certificate. (2 Daniel, sec. 1605.)

The drawer of a check, before it passes from him by delivery to another, can not properly be called the "holder" of the check in the commercial sense. And when such drawer presents his check to the proper officer of the bank to be certified the return of the check into his hands, with the indorsement of certification upon it,

can not with any regard to propriety of speech be called the *delivery* of the check to him. A man's own bond or deed, signed and acknowledged by him, may be handed back to him by the notary who has attested his acknowledgment thereto, but such return of the instrument can not be called its *delivery*. And, therefore, it is inaccurate and misleading to say that when the drawer of a check takes it to the bank upon which it is drawn and there has it certified, that is, marked "good" and signed by the president or cashier, that the return of his check to him is a "delivery" of it, or that into the transaction of certification the element of delivery enters at all.

In 1 Morse on Banking, 3d ed., sec. 411, it is said:

> The bank's liability upon a certification does not arise upon the mere marking the check "good," but upon the delivery of the certified check to the holder or person who presents it. If it receives orders from the drawer, revoking the check after it is marked, but before it is delivered, it delivers the check at its own risk. * * *

From which it is apparent that the author is referring here to the holder for value, or some person representing him and not to the drawer of the check. (See Morse, sec. 415.)

This is a proceeding by the United States against an officer of a national bank for a violation of section 5208, Revised Statutes.

> It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association, unless the person or company drawing the check has on deposit with

the association, at the time such check is certified, an amount of money equal to the amount specified in such check.

The indictment plainly charges the offense in the language of the statute and beyond it. What constitutes "certifying a check" is matter of proof, not of pleading. The statute says nothing of delivery.

(2) That the allegation of the counts that the defendant did not have on deposit at the time such checks were certified "an amount of money then and there equal to the amount then and there specified in said check," is *argumentative*.

If this language is objectionable, for the cause assigned, or for any other, the fault, if any, rests with the statute and not with the pleader; for the language of the court is taken from the statute. The language of the statute may sometimes fail to state adequately the material ingredients or characteristics of the offense charged, and can not, for that reason, be relied on in an indictment, but it can not be objected to it that it is argumentative.

Section 5208, Revised Statutes, prohibits the certification of a check unless the drawer has to his credit in the bank "an amount of money equal to the amount specified in such check."

The counts in this indictment charge that the drawers of the checks therein recited did not have on deposit with the bank "an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of $———."

An indictment is said to be "argumentative" when, instead of direct averments of fact, it employs language

which, however strongly it may convey the charge, yet conveys it by inference and not by direct averment.

An indictment charging that A. B. stole cloth, which upon measurement was found to contain 100 yards, or which upon inquiry was found to be the property of C. D., or which upon calculation was ascertained to be of the value of $———, is argumentative, in that it does not charge directly that the cloth was of a certain quantity, or a certain value, or a certain ownership, but it states simply the result of a measurement, an inquiry, and a calculation, and these, each and all, may have been erroneous. The conclusion stated is one of inference.

Now, here the charge is that the defendant drew his check for, say, $5,000; that he did not have to his credit in bank an amount equal to the amount specified in said check, to wit, $5,000. Plainly nothing is left to inference; nothing is stated as the result of calculation. "An amount equal to an amount" may be redundant, but is as strong and direct and clear as language can make it.

An averment that one drew his check for $5,000 "without having such amount to his credit in bank," or "without having *said* amount or *that* amount," is simply a mode of avoiding repetition by saying that he drew his check for $5,000 without having $5,000 in bank. It avoids, too, another difficulty; one might have to his credit in bank an amount *nominally* equal to the amount of his check, but in a currency, or under conditions which made it less in value than the amount of the check. All such questions are avoided by the language used here in the statute and in the indictment, by which it is charged

that whatever the drawer may have had to his credit, he did not have an amount equal to the amount of his check.

(3) That the counts do not charge that the money was not on deposit, etc., at the time the paying teller authenticated the check specified in each of said counts. The statute says nothing about "authenticating checks." It neither requires nor prohibits it, nor prescribes the form in which it shall be done. The banks sometimes have regulations requiring the teller or some other officer to countersign the checks certified by that bank; but this is nothing more than a rule of the bank, designed to secure accuracy and certainty in its accounts and fidelity on the part of its officers. It is not a universal rule, nor is it executed in the same manner and form in all banks. (*Espy* v. *The Bank of Cincinnati*, 18 Wall., 621.)

ASSIGNMENTS OF ERROR.

These are set out (pp. 168–190):

(1) That the court admitted proof of other instances of the certification of checks by the accused than those recited in the indictment.

The transactions recited in the indictment took place on the 23d, 24th, and 25th July, 1891. It appears on page 126, that—

> During the trial, William S. Bliss, a partner of the firm of Irving A. Evans & Co., was allowed to testify to two conversations with the defendant, occurring in the bank sometime in the month of June, 1891, and three conversations with the defendant, occurring sometime in the month of July, 1891, *before July* 23, etc.

He was asked, "What was that conversation?" To which he answered:

> I went to get a check certified and went to see Mr. Potter for that purpose and stated to him that Mr. Evans sent me over to get the check certified, because we must have the check certified; and he stated that Mr. Evans had not kept his word—had not done as he agreed to; had not reduced the overdraft or loan, and it was not fair and right. I repeated what Mr. Evans would say—that we must have the check certified—and after awhile the check would be certified.

"*No objection was made to this answer.*"

The witness then, in response to similar questions, detailed two subsequent similar conversations with the defendant. To these two last conversations the defendant objected to the statement that in each case the check was certified; his objection was overruled, and he excepted.

Of course the defendant could not have been convicted of an offense not charged or embraced in the indictment. And he could not have been convicted for the unlawful certification of any other checks than those described in the counts. But the defendant's objection was put on the ground that the evidence tended to prove an immaterial and incompetent fact. To this it might be replied that the defendant, having allowed the question to be asked and answered without objection, and having made no motion to have it stricken out, he will not be permitted now in the appellate court to complain of error. True, the witness spoke of *three* conversations with the defend-

ant, and it was his testimony as to but one of these that was admitted without objection, but it does not appear whether the one admitted was the first, second, or third in order of event. They were alike in substance, and the admission of one as evidence to the jury was virtually an admission of all. And Mr. Potter in his testimony (p. 138) says that Mr. Bliss was mistaken as to the date of the conversations; that they occurred in September, after, and not before, the certification. But the testimony was inherently relevant and proper.

The theory of the defense was, and is, that there was on deposit in bank an amount equal to the amount of each of the checks described in the indictment at the time such check was certified. That what, to the vulgar eye, seemed overdrafts, were, in fact, loans; and that the deposits made by Evans should rightfully have been applied to the certified checks and not to the alleged overdrafts. That there was an express agreement to this effect between Evans & Co. and the bank.

Assuming the existence of such an agreement and its validity and its relevancy here, it became obviously necessary that the state of the account between Evans and the bank should be shown to the jury, that they might see how far the theory of the defense was borne out by the facts. At least, it should appear how far the checks that had been certified within a few days of those described in the counts compared in amount with the deposits made in the same period. They were all in some sort parts of the *res gestæ* of the transaction which is the subject of this indictment.

(2) That the court refused to allow Joseph W. Work, the cashier of the bank, called for the defense, to answer the question propounded for defendant:

> What was that debit balance between Mr. Evans and Company and the bank?

Upon objection by the Government, counsel for defendant stated:

> My offer is to show by this and other witnesses that the apparent overdraft, debit balance, due from Irving A. Evans & Co. to the bank, arising out of the account current, on each of the mornings was treated by both parties under an understanding between them as a loan on which daily interest was charged. * * *

The court inquired when this question was put and objected to, if the defense could produce any entries in the bank books, showing the fulfillment of this alleged agreement, and further, if the alleged loans were for specific amounts. To which counsel for defense admitted that entries showing the fulfillment of such agreement would not be produced, and that the loans were not for specific amounts, but that "there was what you may call a general limit of about $200,000, that is, not to exceed it" (pp. 170, 171).

The court in its charge to the jury on this feature of the case, said, page 157:

> It is claimed upon the other side that notwithstanding the facts to which I have called your attention, certain deposits were set aside for the purpose of meeting or covering checks that might be certified. I instruct you that the simple setting aside of checks for that purpose, unless those checks

were so treated by the bank as to become themselves a deposit in some form, would not sustain a defense in this case. I instruct you that the setting aside of a check temporarily, or that the bringing of a check to the bank for the purpose of afterwards having a check certified against it, would not meet the purpose of this statute, unless it was made itself the basis or a part of the deposit. And I instruct you that unless the defense can show or does show that as a matter of fact certain checks were set aside—not a matter of agreement—not that there was an agreement to do so, but unless they show to you that as a matter of fact certain checks were set aside as a deposit, according to the proper course of business, and appearing upon the books and papers of the bank as against which checks might be certified, this proposition will not avail the defense.

And here was stated the conclusive reply to the objection. What if the bank had agreed with the customer, can such agreement prevail if not performed? Can the bank agree to cash the checks of a customer upon the mere promise of such customer that he will at some future time deposit funds sufficient to meet the checks? It was not by the testimony of witnesses that the fact of deposit could be proven, but by the production of books of the bank. It was not within the legal power of the president of the bank to bind the bank by an agreement that unsecured overdrafts to the amount of $200,000 would be allowed Evans & Co. (*Bank of United States* v. *Dunn*, 6 Pet., 51; *Bank of the Metropolis* v. *Jones*, 8 Pet., 12; *Cochecho National Bank* v. *Haskell*, 51 N. H., 116; 1 Morse on Banking, 3d ed., secs. 167, 347; 1 Daniel on Negotiable Instruments, 4th ed., secs. 394–396.)

(3) That the court erred in admitting in evidence the certification by the defendant of six checks, drawn by Evans & Co., upon the Maverick National Bank, dated and certified on July 23 and 24, 1891, because no such checks were embraced in the indictment.

This evidence was admitted on the ground stated in No. 1. It being for the jury to determine the extent to which these transactions were connected with and threw light upon those which are charged in the indictment.

The ground on which this evidence was offered is stated on page 127 to be—

> That they were the acts of the defendant and assisted in proving or had a tendency to prove knowledge on the part of the defendant as to the condition of that account—the amount of deposits or overdraft.

The court admitted "the above certification of checks in evidence so far as they were certified, before Exhibit E on July 25, 1891."

(4) To the refusal of the court to allow the defendant to prove, in his own behalf, an oral agreement between I. A. Evans & Co. and the Maverick National Bank in the early part of 1891, before June or July, 1891, that Evans & Co. might have a loan by overdraft limited to $200,000, etc. (p. 172).

The proceedings had in court on this offer by the defendant appear (pp. 128, 129).

The court called for the production of entries in the bank books tending to show that the deposits had been actually applied to the checks. Counsel admitted that the only entries showed that interest had been calculated on

the overdrafts (p. 128), and stated that the agreement "was carried out by a deposit of collateral in the hands, or in the department, of the assistant cashier, who was the usual certifying officer of the bank."

The court said, page 130:

> I rule out anything that does not appear on the books of the bank in connection with this deposit. I think what was on deposit, and not on deposit, as the case now stands, must be determined by what appears on the books of the bank, as the case now stands, and the papers of the bank. * * * I think the question is, what was done, and not what was agreed to be done.

The proceedings had in court upon the offer of this testimony will be found on pages 129–139; and from these, including the extract from the bank books (p. 138), it appears at the close of each day's business, July 23, 24, 25, large balances were due on the books of the bank from Evans & Co. on account of overdrafts. So that, despite any agreement or understanding as to treating overdrafts as loans, the fact remained patent on the books of the bank that they were not so recognized and treated by the bank. And whatever Mr. Potter, the defendant, may have thought or believed "as to his right to certify checks as against daily deposits, with the knowledge of the debit balances that stood in Evans & Co.'s account, and the condition of his account on the books of the bank" (p. 137), the fact remains that the statute prohibits the officers of the bank from certifying any check drawn upon the bank, unless the person drawing the check has at the time on deposit an amount equal to the amount of the check.

The remaining errors assigned are to the instructions asked for by the defense and refused by the court, and to certain portions of the charge given by the court to the jury. They will be found on pages 139–167.

For convenience they will be considered here according to the subjects-matter, and not by the numerous sections in which they are presented in the record.

The indictment, in its several counts, charges offenses committed by the defendant as to five checks drawn by Irving A. Evans & Co. on the Maverick National Bank. These checks, with the certification thereon by the defendant, and the countersign of the paying teller, are fully set out on page 124, and are referred to throughout the record as Exhibits A, B, C, D, E.

In the several counts these checks are set out according to their tenor, and, in fact, described literally, with the certification by the president thereto. They do not give the signature of the paying teller, but omit that as forming no part of the certification.

The defense asked for instructions, predicated on the theory that the signature of the paying teller formed a material part of the certification, and that its omission from the description of the checks in the courts produced a variance between the allegation and the proof.

At the trial the following vote of the directors of the Maverick Bank was admitted in evidence (p. 116):

> BOSTON, *Nov.* 1, 1886.
>
> Special meeting of the directors, held to-day, Pres't. Potter and Messrs. Mansfield, Wood, Dana, and French being present. It was voted that the

president, cashier, or assistant cashier be authorized to certify any checks drawn on this bank, providing the bank is in funds for amount of said checks when the same are presented, all such checks when certified to be countersigned by the paying teller.

A. P. POTTER, *P.*

Attest:

J. W. WORK, *C.*

In his charge to the jury on this point, the court said, on page 155:

> Here comes the clause which is so important in this case: "All such checks when certified to be countersigned by the paying teller." Now, gentlemen, if the case stood upon that vote alone, so that it was a pure question of law for the court to instruct you about, I should advise you that that vote was merely directory, and that the bank was bound by a certification, although the check got out without the authentication of the paying teller, and that the fact that the indictment does not allege with reference to the certification other than it does allege on this point, and the fact that the United States have not proved other than it has proved upon this point, would afford no defense. I instruct you that *prima facie*, upon this vote, such is the state of the law with reference to this case. But this is a criminal case and I can not take the fact from you, and you are entitled to bear in mind that any vote of the directors, establishing a certain order of things upon this point, or any other, is controlled by the course of business at the bank and must be practically construed in the light of the course of business at the bank; and if on the proofs in this case altogether, taking this vote with the rest, you are not satisfied beyond a reasonable doubt that the president was

authorized to bind the bank by certification, you must find a verdict for the defendant upon the whole indictment.

But aside from the fact that this was a mere directory regulation of the board of directors for the convenient and orderly transaction of the business of the bank, and not an amendment of the statute law, as found in section 5208, Revised Statutes, and was not intended and could not operate to annex any new terms or conditions to the check, or to its certification by the president—on the face of the resolution or "vote" itself, this is plainly shown.

It provides that something is "to be countersigned by the paying teller. What? The check as drawn by the maker? No; but "all checks when certified."

The thing that came into the hands of the paying teller to be countersigned by him was a check already *certified by the president.* He was authorized to countersign only *certified checks;* and when they came to him completely certified, then, and then only, was his supplemental act of countersigning them to be performed.

Now the statute relates to checks in the condition in which they appeared after leaving the hands of the president and before reaching the hands of the paying teller. So the indictment, which was drawn after and according to the statute, properly disregarded and ignored all that happened to the checks after the president had certified them.

But, further, it won't do to recognize this "vote" of the board of directors as operating an amendment of the statute, because in truth it is in the very teeth of a most material feature of the statute.

Section 5208, Revised Statutes, provides:

> It shall be unlawful for any officer * * * of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, *at the time such check is certified*, an amount of money equal to the amount specified in such check.

While the vote of the board of directors provides that "The president * * * be authorized to certify any checks drawn on this bank, providing the bank is in funds for the amount of such checks *when the same are presented*," etc.

The check may be presented for certification on Monday, at which time the drawer may have funds to his credit in the bank. It may not be actually certified by the president or other officer until Tuesday, at which time the drawer may have no funds to his credit.

The statute makes it the duty of the certifying officer to see that the drawer has sufficient funds to his credit in the bank *at the time the check is certified* and *not* that he did have funds to his credit at the time *when the check was left with the bank for certification.*

DELIVERY OF THE CHECK.

The defendant insists that there must have been a formal delivery of the certified check to the owner of it, and that this should have been charged in the indictment.

We have already considered this under another head, and have there endeavored to point out the difference between

the certification of a check at the request of the holder for value, and its certification at the request of the drawer before it has passed from his hands; and, also, that the act condemned by the statute is one that needs no concomitants to bring it fully within the range of the spirit and letter of the law. It is the single act of certifying a barren check.

AGREEMENTS OF BANK OFFICERS.

Many of the instructions asked for related to the effect of agreements made between the bank and the depositor. As to all of which it may be replied, that whatever may be the effect of any such agreements in a *civil* action, they can have no place here, where the proceeding is by indictment, not against the bank, but against an officer of the bank for doing what the statute has declared it was unlawful for him to do, and no agreement or any resolution of a board of directors can suffice to exonerate him from the obligation to obey that law.

The court below has placed its refusal to so instruct on the ground, that not what was agreed to be done, but what the books of the bank show to have been actually done, can be entitled to consideration here.

The board of directors may relieve the president from a civil liability to the bank, growing out of his acts or omissions, but it can not absolve him from a criminal liability imposed by the statute and incurred by him.

VIOLATION OF THE STATUTE COMMITTED BY THE PRESIDENT OF A BANK THROUGH ERRONEOUS INFORMATION RECEIVED FROM A SUBORDINATE OFFICIAL DOES NOT EXCUSE THE PRESIDENT.

The court refused to instruct the jury that if a clerk in the bank had reported to the president that a fact existed, and that the president had acted upon such report without himself verifying it and had certified that such fact did exist, when in truth it did not, that the report of the clerk justified the president's certificate.

The fact which the president certifies is, that at the time of such certificate the drawer of the check has to his credit in the bank funds sufficient to meet it. Whoever makes such a certificate must make it as of his own knowledge. The bank books must show the credit. The president is not permitted to "rely that the clerk has done his duty." That would be making the clerk the certifying officer. If that rule obtained, every certifying officer would take care never to act upon his own personal knowledge or investigation, but always to have at hand a clerk; and always "rely that the clerk has done his duty." And so it would be that the certifying officer could not be held liable, because he had relied upon the report of the clerk; and the clerk could not be held liable, because the law had not made it his duty to ascertain or to certify the fact.

Indeed, as to this class of statutory offenses, it may well be doubted if *intention* should be regarded as material element at all in the offense. It is the *act*, and not the *intent* with which the act was done, that constitutes the offense. There is no question of *mala fides* or moral turpitude involved.

The important question of the intent required in statutory crimes is fully considered in *Regina* v. *Tolson* (23 Q. B. Div., 168).

The court below in the charge to the jury dwelt at length upon this feature of the case (pp. 157–160), holding:

> That the word "willfully" is an essential part of this indictment, and the words that "the said Potter then and there well knew"—that is to say, that Potter then and there well knew that there were no funds on deposit—are necessary, and are to be proved by the United States beyond a reasonable doubt. But this part of the case offers some difficulty (p. 158).

And, again, on page 160:

> The rule which I gave you on this branch of the case is subject, however, to one modification: If you should find that the defendant had not actual knowledge of the state of the account at the time when he certified the check, upon which either count is based, and if the case proves beyond a reasonable doubt that the want of knowledge arose from the fact that, contrary to his duty he willfully closed his eyes and refused to see, he can not be excused because he did not discover that for which he would not look. If you are satisfied beyond a reasonable doubt that the want of knowledge proceeded from a will to disobey the statute, or from an indifference to its commands, you may find that, if his acts were otherwise a violation of the statute, his acts were willfully done within its terms, and the want of actual knowledge would not be important and would not avail the defendant.

In *United States* v. *Allen* (47 Fed. Rep., 696) Allen was indicted for making false entries in a statement of the

condition of a national bank, the statement being made by him, as its president, to the Comptroller of the Currency. He relied for his defense on the ground that—

> The reports signed and verified by him were prepared by some clerk or subordinate in the bank, and that the defendant, without any actual knowledge of the truth of the statements contained in the reports, signed and verified them, believing them to be true, because made in the due course of business.

Blodgett, J., in charging the jury said:

> The defendant can not be heard to say that he did not know what was in reports made and sworn to by him in due course of his duty under the law. It is his duty to know whether the report is true or not. * * * So that ignorance of the contents of the report or of the actual condition of the bank as to the amount of money or other available assets on hand is no excuse for a false statement made in these reports. * * * Therefore a bank officer, called upon to make reports under the law, can not avoid the responsibility, either civil or criminal, for statements in the report by showing that they were made by a clerk and that if false he did not know it.

And if this be true as to a statement which the statute requires (sec. 5209, R. S.) must be made with "intent to defraud," how much stronger must it apply to a case in which the statute requires that when the president certifies a check there must be at that time as a matter of fact—and not as a matter of belief—enough money in the bank to the credit of the drawer of the check to meet the check.

EFFECT OF CERTIFICATION OF CHECK ON DRAWER'S ACCOUNT IN BANK.

The court refused to instruct that when a debit balance appears on the bank's books at the beginning of the day, and deposits are made on that dealer's account during the day, and the president certifies checks for the dealer within the amount of these deposits, that such certification is an application by the bank of such deposits to the checks so certified.

That is not true in fact or in law. The depositor's account is an entire thing. It consists of a debit side and a credit side. If on any given morning a balance appears on the debit side and deposits are entered on the credit side during the day that of itself operates an application of such deposits *ipso facto* to the existing debit balance. And after being once entered to that account in the ledger they are so far absorbed in any existing debit balance that the officers of the bank have no rightful power to make any other application of them.

At any time it is only the balance of all the items up to that date that the customer can recover from the bank, or for which he can draw his checks upon it. It is the first item on the debit side that is discharged or reduced by the first item on the credit side without regard to the identity or disparity of any particular sums. (1 Morse on Banking, 3d ed., sec. 355, and cases cited.)

HOLMES CONRAD,
Assistant Attorney-General.

ALEXANDRIA & WASHINGTON RAILROAD AND ALEXANDRIA & FREDERICKSBURG RAILWAY.

No. 266 Penna R.R.C. stock Jones. P. 85

No. 3. TIME TABLE. No. 3.

To take effect at 12.30 P. M. Sunday, November 2, 1884, superseding Time Table No. 2, dated October 12, 1884.

For the information and government of EMPLOYEES ONLY, and not intended for the information of the Public.

LEAVE SOUTHWARD

STATIONS AND SIDINGS.	Minimum Time between Stations.	Freight Trains.		PASSENGER TRAINS.														Distance from Washington.
		3d Class.	3d Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	
		205	207	137	31	123	121	103	15	119	117	115	27	113	37	111	23	
		Fast Freight.	Local Freight.	Alex. & Wash. Accom.	Midland Passenger.	Alex. & Wash. Accom.	Alex. & Wash. Accom.	Midland Passenger.	Southern Day Line.	Alex. & Wash. Accom.	Alex. & Wash. Accom.	Alex. & Wash. Accom.	Fast Mail.	Alex. & Wash. Accom.	Midland Passenger.	Alex. & Wash. Accom.	Southern Night Line.	
WASHINGTON 0.5	Min.	‖P M	§A M	§P M 11.35	P M 10.40	P M 8.05	§P M 6.00	P M 5.10	§P M 4.45	§P M 4.56	§P M 2.05	§A M 11.35	A M 11 01	A M 9.25	A M 9.10	§A M 7.00	A M 6.00	.0
9th St. and Md. Ave. 1.6	7	9.46	7.30	11.29	10.44	8.09	6.04	5.14	4.49	4.20	2.09	11.29	11.04	9 29	9.14	7.04	6.04	0.5
South end L. Bridge 1.0	3	10.00	7.39	11.44	‖10 49	8.14	6.09	5.19	4.54	4.35	2 14	11.44	11.09	9.34	9.19	7.09	6.09	2.1
Waterloo 2.8	8	10.04	‖7.45	11.47	‖10.51	8.17	6.13	‖5 21	4.58	4 38	2.17	11.47	11.11	9.37	9 21	7.13	‖6.11	3.1
St. Asaph Junction 1.7	10	10.43	8.08	11.53	10.55	8.23	6.17	5.25	5.00	4.46	,2 23	11.53	11.15	9.46	9.25	7.17	6.15	5.4
St. Asaph Station Va. Mid. Station					11.00			5.20							9 20			
ALEXANDRIA 6.8	25	10.53	8.20 9.10	11.55		8.25	6.20		P5.05	4.50	2.25	11.55	P11.18	9.50		7.20	P6.19	7.1
Franconia 3.5	14	11.35	9.45	P M	P M	P M	P M	P M	5.21	P M	P M	A M	11 31	A M	A M	A M	6.35	13.9
Long Branch 3.3	10	11.44	10.17						5.28				11.36				6.41	17.4
Telegraph Road 3.1	10	11.57	10,37						5.35				11.41				6.48	20.6
Woodbridge 6.6	23	12.10	10.57						5.43				11.46				6.56	28.7
Cherry Hill 3.9	13	12.27	11.38						6.00				11.57				7.11	30.5
QUANTICO		12.53 1.30	11.50 3.00						6.10 6.13				12.05 12.08				7.20 7.23	34.4
		§A M	§P M						§P M				‖P M				‖A M	
RICHMOND		7 50 §A M	11.00 §P M						9.30 §P M				2.30 ‖P M				10.30 ‖A M	

LEAVE NORTHWARD

STATIONS AND SIDINGS.	Distance from Quantico.	PASSENGER TRAINS.															Freight Trains.		Minimum Time Between Stations.	STATIONS AND SIDINGS.
		1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	1st Class.	3rd Class.	3rd Class.		
		136	110	102	112	114	62	116	118	66	120	122	58	104	76		204	206		
		Alex. & Wash. Accom.	Alex. & Wash. Accom.	Midland Passenger.	Alex. & Wash. Accom.	Alex. & Wash. Accom.	N. Y. & Wash. Express.	Alex. & Wash. Accom.	Alex. & Wash. Accom.	Congress'l Express	Alex. & Wash. Accom.	Alex. & Wash. Accom.	Midland Pass'r	Midland Pass'r	South'n Night Line.		Fast Freight.	Local Freight.		
WASHINGTON 0.5 LE	34.4	A M 12.30	A M 6 35	A M p 8.00	A M 8.35	A M 10.20	A M p10.30	P M 1.20	P M 3.25	P M p 3.40	P M 5.25	P M ‖3.30	P M s9.50	P M s10.30	P M s11.00		A M	P M	Min.	WASHINGTON 0.5
9th St. and Md. Ave. 1.6	33.9	12 26	6.31	7.56	8.31	10.16	10.26	1.16	3.21	3.37	5.31	‖3.26	9.46	10.21	10.56		3.20	4.49	7	9th St. & Md. Ave. 1.6
South end L. Bridge 1.0	33.8	12.21	6 16	7.51	8.16	10.11	10.21	1.11	3 16	3.33	5.26	‖7 21	9.41	10.16	*10.51		3.25	4.35	3	South end L. Bridge 1.0
Waterloo 2.8	31.8	12.18	‖ 6.13	‖ 7.48	8.13	10.08	10.18	1.08	3.13	3.30	‖ 5.23	7.18	9.39	10.14	*10.48		3.19	4.31	8	Waterloo 2.8
St. Asaph Junction 1.7	30.0	12.13	6 08	7.43	8.03	10.08	10.13	1.08	3.08	3.25	5.13	‖7 08	9.35	10.10	10.43		3.10	4.21	10	St. Asaph Junc. 1.7
St. Asaph Station Va. Mid. Station				7.35									9.30	10.05						St. Asaph Station Va. Mid. Station
ALEXANDRIA 6.8	27.3	12.10	6.05		8.00	10.00	P10.10	1.00	3.05	P 3.22	5.10	‖6 05			P10.40		‖3.00	4.10	25	ALEXANDRIA 6.8
Franconia 3.5	20.5	¶A M	§A M	‖A M	‖A M	§A M	9.54	§P M	§P M	P 3.09	§ P M	P M	‖ P M	‖ P M	10 27		3.33	3.50	14	Franconia 3.5
Long Branch 3.3	17.0						9.47			F 3.02					10.20		2.14	3.02	10	Long Branch 3.3
Telegraph Road 3.1	13.8						9.40			P 2.56					10.14		2.01	2.38	10	Telegraph Road 3.1
Woodbridge 6.6	10.7						9.32			P 2.50					10.06		1.48	2.18	23	Woodbridge 6.6
Cherry Hill 3.9	8 9						9.15			2.37					9.53		1.16	1.48	13	Cherry Hill 3.9
QUANTICO AR LE	.0						9.05			2.30					9.45		1.00	1.35		QUANTICO
LE QUANTICO AR							9.00			2.24					9.40		12.44	1.25		
							‖A M			§P M					‖ P M		§A M	§ P M		
RICHMOND AR							6.00 ‖A M			11.07 §A M					6.33 ‖ P M		7.00 ‖P M	5.30 §A M		RICHMOND

‖Daily. ‖Daily except Saturday. §Daily except Sunday. ¶Daily except Monday. *Note Train on opposite Track. P Stop for Passengers. F Flag Stations.

1. *On Single Track, all North Bound trains will have the absolute right of track over trains of the same or inferior class, running in the opposite direction.*

2. The attention of Conductors and Engineers of trains not having the right of track, is directed to Rule No. 91.

3. Trains meet and pass, when on time, at Stations indicated by Full Faced Figures.

4. The standard clock is at the Superintendent's Office, Wilmington. The standard time will also be shown by the clock at Washington Telegraph Office.

5. The maximum speed for First Class Trains is one and one-fourth minutes to the mile; for Third Class Trains, three minutes to the mile; and for Work Trains, two and a half minutes to the mile. To be reduced when not consistent with safety.

6. All North-bound A. & F. and A. & W. trains will observe that B. & P. trains have the absolute right of track, from the Passenger Station, to the corner of Sixth street and Maryland avenue, Washington.

7. All trains must be run with great caution through the streets of Washington and Alexandria.

8. Trains of the Virginia Midland Railroad will use the Henry street track, between St. Asaph Junction and Virginia Midland Station.

9. Reduce speed to ten miles per hour in crossing all Trestle Bridges between Alexandria and Quantico.

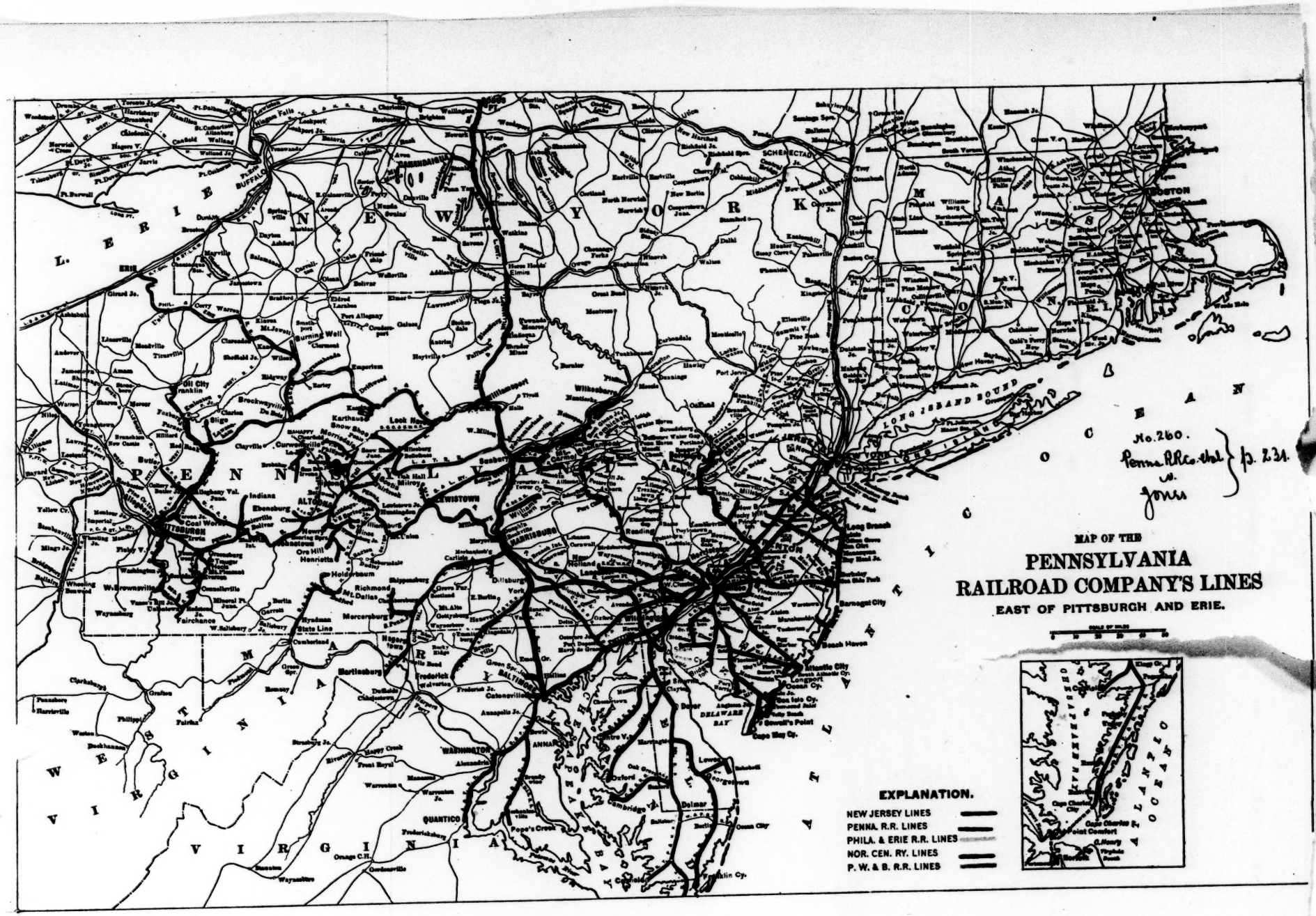
10. Trains No. 62, 76, 23, and 15 will stop for Passengers at Stations south of Alexandria.

11. Train No. 206 can have until 4.40 P. M. to run to Ninth street and Maryland avenue for train No. 15. Train No. 15 will note.

OBSERVE Rule No. 90 at South end Long Bridge; Aqueduct Gauntlet; St. Asaph Junction; Va. Midland Crossing; and the Draw Bridges at Long Bridge, Neabsco, Powell's Creek, and Quantico Creek.

a Breakfast. b Dinner. c Lunch. d Supper.

CHAS. E. PUGH, General Manager. H. F. KENNEY, General Superintendent. H. H. CARTER, Superintendent.


MAP OF THE
PENNSYLVANIA
RAILROAD COMPANY'S LINES
EAST OF PITTSBURGH AND ERIE.
EXPLANATION.
NEW JERSEY LINES
PENNA. R.R. LINES
PHILA. & ERIE R.R. LINES
NOR. CEN. RY. LINES
P. W. & B. R.R. LINES
L. ERIE
NEW YORK
PENNSYLVANIA
WEST VIRGINIA
VIRGINIA
ATLANTIC OCEAN
BOSTON
NEW YORK
PHILADELPHIA
BALTIMORE
WASHINGTON
PITTSBURGH
BUFFALO
ALTOONA
HARRISBURG
LEWISTOWN
LONG ISLAND SOUND
DELAWARE BAY
CHESAPEAKE BAY
No. 260.
Penna. R.R. Co. et al
v.
Jones
p. 231.

139½ 1891.		Thursday, July 23rd.						Friday, July 24th.						Saturday, July 25th.				
	Balance.			Checks.	Deposits.		Balance.			Checks.	Deposits.		Balance.			Checks.	Deposits.	
																Bal. close of July 25th.		190,855 47
Evans & Co., I. A.	178,166 01	371 25 528 250 25,000 287 50 343 75 172 50 287 50 6,500 2,450 1,600 1,050 3,312 50 1,050 1,050 3,225 25,000 7,950 2,370 59 8,350 7,925 6,400 1,600 7,912 50 7,987 50 3,250 1,800	27,240 50 25 88 7,962 50 500 $100,783 09 4,300 8,350 7,500	157,261 97	147,463 62	—50,000 85,363 62 12,100	187,964 36	184 50 900 900 300 490 450 450 357 81 75 750 11,763 19 618 75 719 05 300 150 21 300 8,275 25,000 8,287 50 3,000 1,925 9,125 7,500 8,262 50	18,735 24 92 25 1,638 73 937 50 25 27 $71,375 14,550 19,610 1,812 50 1,837 50	130,613 99	62,321 20 55,000	—55,000 6,770 55,551 20	201,257 15	1,515 63 300 25,000 8,287 50 7,500 3,200 4,800 3,200 1,940 73 3,175 3,560 4,762 50 6,350 9,525 9,737 50 1,600 3,325 3,187 50 8,212 50	1,815 63 100 500 53 23 11,341 3,187 50 $107,363 23 82 8,275	132,717 59	143,119 27	—50,000 93,119 27